Certiorari

Supreme Court of the United States

OCTOBER TERM, 1938

No. 550

BETHLEHEM STEEL COMPANY, PETITIONER,

vs.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITION FOR CERTIORARI FILED JANUARY 13, 1939.

CERTIORARI GRANTED JANUARY 16, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 590

BETHLEHEM STEEL COMPANY, PETITIONER,

vs.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Index No. 24334—1937

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff-Appellant,

against

BETHLEHEM STEEL COMPANY, Defendant-Respondent

STATEMENT UNDER RULE 234

This is an appeal from the order of Mr. Justice Samuel I. Rosenman made and entered in the office of the Clerk of the County of New York on the 9th day of December, 1937, which granted plaintiff's motion for summary judgment against the defendant-respondent only to the extent of the amount admitted to be due by said defendant-respondent and dismissed the complaint in respect to plaintiff-appellant's claim in excess of that amount, and from the final judgment entered thereon in the office of the Clerk of the County of New York on the 16th day of December, 1937.

The action was commenced on April 10, 1937, by acceptance of service of a copy of the summons and complaint by the attorneys for defendant-respondent. Issue was joined on June 1, 1937, by service of defendant-respondent's amended answer.

[fol. 2] Plaintiff-appellant appeared by Messrs. Miller, Owen, Otis & Bailly, as its attorneys.

Defendant-respondent appeared by Messrs. Cravath, deGersdorff, Swaine & Wood, as its attorneys.

There has been no change of parties or attorneys, except that the order entered December 9, 1937, severed this action as against Lackawanna Steel Company and Bethlehem Iron Mines Company, which were parties defendant in the court below, and plaintiff-appellant does not appeal from that part of said order.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

Index No. 24334—1937

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff,

against

BETHLEHEM STEEL COMPANY, Defendant

NOTICE OF APPEAL TO APPELLATE DIVISION

Please take notice that the plaintiff above named hereby appeals to the Appellate Division of the Supreme Court for the First Department from the final judgment entered [fol. 3] herein in the office of the Clerk of the County of New York on the 16th day of December, 1937, and the plaintiff also appeals to said Appellate Division from the order of Mr. Justice Samuel I. Rosenman herein, made and entered in the office of the Clerk of the County of New York on the 9th day of December, 1937; and the plaintiff hereby appeals from each and every part of said judgment and order except so much of the order as directs that this action be severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company.

Dated, New York, N. Y., December 29, 1937.

Yours, etc., Miller, Owen, Otis & Bailly, Attorneys for Zurich General Accident & Liability Insurance Company, Ltd., 15 Broad Street, New York, N. Y.

To Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, 15 Broad Street, New York, N. Y.
Andrew B. Keating, Esq., Acting clerk of New York County.

[fol. 4] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

ORDER APPEALED FROM—December 9, 1937

The plaintiff in the above-entitled action, having made a motion for an order striking out the amended answer of the defendant Bethlehem Steel Company on the ground that there is no defense to the action and for judgment for the

plaintiff against the defendant Bethlehem Steel Company for the relief demanded in the complaint, pursuant to Rules 113 and 114 of the Rules of Civil Practice, and for such other and further relief as to this Court might seem just and proper and for the costs of this motion;

[fol. 5] And said motion having duly come on to be heard at a Special Term, Part I, of this Court, on the 24th day of September, 1937;

And upon the hearing of said motion, the attorneys for the plaintiff having tendered to this Court all of the coupons upon which the causes of action set forth in the complaint are based;

And the attorneys for the plaintiff and the attorneys for the defendant Bethlehem Steel Company having stipulated at the hearing of said motion, with the consent and approval of this Court, that all of said coupons were presented to this Court in support of the motion, that said coupons be returned to the possession of the attorneys for the plaintiff, and that the marking of them as exhibits in evidence and the depositing of them with and under the order of this Court at the time of said hearing pursuant to Rule III, subdivision 8, of the Rules of this Court for Special Terms, be waived;

And the attorneys for the plaintiff and the attorneys for the defendant Bethlehem Steel Company having stipulated that the Mortgage Indenture dated February 16, 1910, from Lackawanna Steel Company to Union Trust Company of New York securing the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, payable March 1, 1950, be deemed to be before the Court as part of the moving papers on said motion;

And the defendant, Bethlehem Steel Company, having contended, *inter alia*, that Public Resolution No. 10 of the 73rd Congress of the United States, adopted June 5, 1933, was determinative of the issues contained in the pleadings in favor of the defendant; and the plaintiff having contended, *inter alia*, that said Public Resolution No. 10 of the 73rd Congress of the United States, did not affect the rights [fol. 6] of the plaintiff to the relief demanded in the complaint herein, and that if said Resolution were construed as affecting said rights, then to that extent said Resolution is unconstitutional in that it offends and is contrary to the Fifth Amendment of the Constitution of the United States

and is in excess of the powers granted to the Congress of the United States by said Constitution;

Now, on reading and filing the complaint and the amended answer of the defendant Bethlehem Steel Company, the notice of motion dated September 14, 1937, with proof of the due service thereof, the affidavit of William W. Miller, sworn to September 14, 1937, with Exhibits A and B annexed thereto, the affidavit of A. Sprecher, sworn to July 29, 1936, with Exhibit A annexed thereto, three affidavits of J. Hunsperger, sworn to, respectively, September 9, 1936, April 26, 1937, and July 15, 1937, with Exhibit A annexed to the first mentioned of said three affidavits, the affidavit of George L. LeBlanc, sworn to September 14, 1937, and two affidavits of Redmond F. Kernan, Jr., sworn to, respectively, September 14, 1937, and September 23, 1937, all in support of said motion; and on reading and filing the affidavit of William J. Brown, sworn to September 17, 1937, with Exhibits A and B annexed thereto, the affidavit of William F. Majory, sworn to September 22, 1937, and the affidavit of Robert D. Blasier, sworn to September 22, 1937, all in opposition to said motion; and upon all the papers and proceedings heretofore had herein, and after hearing Redmond F. Kerman, Jr., Esq., of counsel for the plaintiffs, in support of said motion, and William D. Whitney, Esq., of counsel for the defendant Bethlehem Steel Company, in opposition thereto, and due [fol. 7] deliberation having been had thereon, and upon filing the opinion of the Court, and this Court having determined that the amount owing by the defendant Bethlehem Steel Company on the coupons sued upon is only the number of dollars specified in said coupons, namely, $25 per coupon, it is

Ordered that said motion be, and the same hereby is, granted to the extent, but only to the extent, of directing, and it is hereby directed, that final judgment be entered herein in favor of the plaintiff and against the defendant Bethlehem Steel Company for the amount in dollars expressed to be payable on the 1132 coupons sued upon in the first cause of action and the 323 coupons sued upon in the second cause of action, to wit, the sum of $28,300 on the first cause of action and the sum of $8,075 on the second cause of action; together with the costs and disbursements of the action; and it is

Further Ordered that the complaint be, and it hereby is, dismissed as against the defendant Bethlehem Steel Com-

pany in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon and in respect to its claim for damages in dollars in excess of $25.00 for each coupon, and that the final judgment to be entered herein provide to that effect; and it is

Further Ordered that this action be and the same hereby is severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company.

Enter.

S. I. R., J. S. C.

[fol. 8] In Supreme Court of New York, New York County

Index No. 24334—1937

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff,

against

Bethlehem Steel Company, Defendant

Judgment Appealed From

Plaintiff having moved for an order striking out the amended answer of the defendant Bethlehem Steel Company on the ground that there is no defense to the action and for judgment for the plaintiff against the defendant Bethlehem Steel Company for the relief demanded in the complaint pursuant to Rules 113 and 114 of the Rules of Civil Practice, and said motion having duly come on to be heard before Mr. Justice Samuel I. Rosenman at a Special Term, Part I of this Court on September 24, 1937, and Redmond F. Kernan, Jr., Esq., of Miller, Owen, Otis & Bailly, attorneys for the plaintiff, having appeared in support of said motion, and William D. Whitney, Esq., of Cravath, deGersdorff, Swaine & Wood, attorneys for the defendant, having appeared in opposition thereto, and the Court after due deliberation having made, entered and filed an order on the 9th day of December, 1937, granting said motion to the extent, but only [fol. 9] to the extent of directing that final judgment be entered herein in favor of plaintiff and against the defendant Bethlehem Steel Company for the amount in dollars expressed to be payable on the coupons sued upon, together with the costs and disbursements of the action; and dismiss-

ing the complaint against the defendant Bethlehem Steel Company in respect to the claim of the plaintiff of its right to receive 129.50 Swiss francs for each coupon and in respect to its claim for damages in dollars in excess of $25 for each coupon; and directing that this action be severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company; it is

Adjudged that the plaintiff Zurich General Accident & Liability Insurance Company, Ltd., of Zurich, Switzerland, have judgment against the defendant Bethlehem Steel Company, a Pennsylvania corporation having an office at 25 Broadway, City and State of New York, in the sum of $36,375; and it is

Further Adjudged that the plaintiff's complaint be, and the same hereby is, dismissed as against defendant Bethlehem Steel Company in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon subject of this action and in respect to its claim for damages in dollars in excess of $25 for each of said coupons.

Judgment entered this 16th day of December, 1937.

Andrew B. Keating, Acting Clerk. (Seal.)

[fol. 10] In Supreme Court of New York, New York County

[Title omitted]

Summons

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, March 24, 1937.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff,
Office and Post Office Address, No. 15 Broad Street,
New York, N. Y.

[fol. 11] IN SUPREME COURT OF NEW YORK

COMPLAINT

The plaintiff above named, appearing herein by Miller, Owen, Otis & Bailly, its attorneys, complains of the defendants and alleges on information and belief:

For a First Cause of Action:

First. At all times hereinafter mentioned the plaintiff was and still is a corporation organized and existing under and by virtue of the laws of the Republic of Switzerland, having its principal place of business in Switzerland.

Second. At all times hereinafter mentioned the defendant Lackawanna Steel Company was and, for the purposes of this suit, still is a corporation organized and existing under the laws of the State of New York.

Third. At all times hereinafter mentioned the defendant Bethlehem Iron Mines Company was and, for the purposes of this suit, still is a corporation organized and existing under the laws of the State of New York.

Fourth. At all times hereinafter mentioned the defendant Bethlehem Steel Company was and still is a foreign corporation, organized and existing under the laws of the State of Pennsylvania authorized to do business in the State of New York, with an office at No. 25 Broadway in the Borough of Manhattan, City, County and State of New York.

[fol. 12] Fifth. On or about the 1st day of March, 1910, in the City and State of New York, the defendant Lackawanna Steel Company duly made and, for value received, issued and delivered in coupon form its First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910, and due March 1, 1950. Attached to each of said bonds there were semi-annual interest coupons numbered from 1 to 80, inclusive, payable on the 1st day of March and the 1st day of September in each year during the term of said bond. By each of said coupons the defendant Lackawanna Steel Company promised that unless the bond to which said coupon was attached should have been called for previous redemption, it would pay to the bearer on the maturity date of said coupon at its office or agency in the City of New York,

United States of America, $25.00 United States gold, or in London, England, five pounds two shillings, ten and one-half pence sterling (£5.2.10-½), or in Frankfort-on-Main, Germany, one hundred and five marks (M. 105), or in Amsterdam, Holland, sixty-two (62) Guilders, or in France, one hundred twenty-nine and one-half (129.50) French francs, or in Belgium, one hundred twenty-nine and one-half (129.50) Belgian francs, or in Switzerland, one hundred twenty-nine and one-half (129.50) Swiss francs, being six months' interest then due on each of its respective First Consolidated Mortgage Gold Bonds, Series A, above-described. On the face of each of the above-described bonds, it is stipulated that payment of said interest is to be made at the office or agency of the Lackawanna Steel Company in the Borough of Manhattan, in the City of New York, State [fol. 13] of New York, or at other designated offices in the foreign cities and countries above mentioned. The office or agency, so designated and stated on the back of each of said coupons for payment in Switzerland, is at Schweizerische Kreditanstalt, in Zurich, Switzerland. A copy of the form of said coupons and of said bonds are hereto attached, marked respectively Exhibit "A" and Exhibit "B" and made a part hereof.

Sixth. On or about the 10th day of October, 1922, defendant Bethlehem Iron Mines Company under its former name Bethlehem Steel Company of New York, Inc., acquired by purchase the property of said Lackawanna Steel Company, as an entirety, and, for a valuable consideration and as part of the purchase price of the said property of Lackawanna Steel Company as an entirety, by an indenture dated October 10, 1922, between said defendant then known as Bethlehem Steel Company of New York, Inc., and Central Union Trust Company of New York, as trustee, for the benefit of said Trustee and for the benefit of the plaintiff as holder of the bonds and coupons mentioned and described in paragraph "Eighth" hereof, assumed the due and punctual payment of the principal and interest of said Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, and undertook to perform all of the terms and conditions thereof, and assumed the performance of all the covenants and conditions of the mortgage given to secure said bonds, and charged therewith the property and franchises so purchased from Lackawanna Steel Company.

[fol. 14] Seventh. On or about December 26, 1936, defendant Bethlehem Iron Mines Company was merged, by a Certificate of Merger, filed in the office of the Secretary of State of New York, with the defendant, Bethlehem Steel Company, a Pennsylvania corporation, under Section 85 of the New York Stock Corporation Law, and defendant Bethlehem Steel Company assumed all the liabilities and obligations of the merged Bethlehem Iron Mines Company and became liable therefor in the same manner as if defendant Bethlehem Steel Company had itself incurred such liabilities and obligations.

Eighth. Prior to the 1st day of September, 1934, plaintiff purchased for value 323 of the First Consolidated Mortgage Gold Bonds, Series A, of Lackawanna Steel Company referred to in paragraph "Fifth" hereof with all coupons numbered 49 maturing September 1, 1934 and all subsequent coupons attached thereto and plaintiff ever since has been, and now is, the lawful owner, holder and bearer of said 323 bonds and all of the coupons attached thereto numbered 49, 50, 51, 52 and 53 which matured, respectively, September 1, 1934, March 1, 1935, September 1, 1935, March 1, 1936 and September 1, 1936, except forty (40) coupons numbered 49, forty (40) coupons numbered 50 and forty (40) coupons numbered 51 which have heretofore been paid by defendant Bethlehem Iron Mines Company pursuant to a judgment of this Court. None of the 323 bonds above mentioned has been called for redemption.

Ninth. On the 15th day of July, 1936, the plaintiff caused to be presented at Schweizerische Kreditanstalt (Credit Suisse), the paying agents designated at Zurich, Switzer- [fol. 15] land, for the payment of the above-mentioned bonds and coupons each of 283 of said coupons numbered 49, each of 283 of said coupons numbered 50, each of 283 of said coupons numbered 51 and each of 283 of said coupons numbered 52, attached, respectively, to 283 of said 323 First Consolidated Mortgage Gold Bonds, Series A, of Lackawanna Steel Company referred to in paragraph "Eighth" hereof and caused payment to be duly demanded with respect to each of said 1132 coupons against the surrender thereof of 129.50 Swiss francs, or 146,594 Swiss francs, the aggregate amount which the defendant Lackawanna Steel Company agreed to pay and which the defendants Bethlehem Iron Mines Company and Bethlehem Steel Company

have assumed and agreed to pay in respect of said coupons, but the defendants neglected and refused to pay the said Swiss francs or the amount of said Swiss francs due on any of such coupons, and the said coupons being so dishonored were protested for non-payment.

Tenth. On the 15th day of July, 1936, when said coupons were presented at Zurich, Switzerland, as aforesaid, the market value in Zurich, Switzerland, in lawful money of the United States of $146,594 Swiss francs, payable in respect to said 1132 coupons, was $48,009.54, said Swiss francs on that day being of the market value of 32.75 cents per Swiss franc.

Eleventh. On the 1st day of September, 1934, when the 283 coupons numbered 49 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, [fol. 16] in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons, was $12,141.65, said Swiss francs on that day being of the market value of 33.13 per Swiss franc.

On the 1st day of March, 1935, when the 283 coupons numbered 50 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons, was $11,947.41 said Swiss francs on that day being of the market value of 32.60 per Swiss franc.

On the 1st day of September, 1935, when the 283 coupons numbered 51 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons was $11,929.08, said Swiss francs on that day being of the market value of 32.55 per Swiss franc.

On the 1st day of March, 1936, when the 283 coupons numbered 52 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons, was $12,116.00 said Swiss francs on that day being of the market value of 33.06 per Swiss franc.

Twelfth. There is now due and owing by the defendants to the plaintiff in respect to the 1132 coupons, the subject

of this First Cause of Action, the sum of $48,134.14, together with interest thereon from July 15, 1936, no part of which has been paid, although payment thereof has been duly demanded.

[fol. 17] For a Second Separate and Distinct Cause of Action:

Thirteenth. The plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "First", "Second", "Third", "Fourth", "Fifth" and "Sixth", "Seventh" and "Eighth" hereof as if herein fully set forth.

Fourteenth. On the 7th day of September, 1936, the plaintiff caused to be presented at Schweizerische Kreditanstalt (Credit Suisse), the paying agents designated at Zurich, Switzerland, for the payment of the above-mentioned bonds and coupons each of 323 coupons numbered 53, attached respectively to the 323 First Consolidated Mortgage Gold Bonds, Series A of Lackawanna Steel Company referred to in paragraph "Eighth" hereof, and caused payment to be duly demanded with respect to each of said 323 coupons against the surrender thereof of 129.50 Swiss francs, or 41,828.50 Swiss francs, the aggregate amount which the defendant Lackawanna Steel Company agreed to pay, and which the defendants Bethlehem Iron Mines Company and Bethlehem Steel Company have assumed and agreed to pay, in respect of said coupons, but the defendants neglected and refused to pay the said Swiss francs or the amount of said Swiss francs due on any of such coupons and the said coupons being so dishonored were protested for non-payment.

Fifteenth. On the 7th day of September, 1936, when said coupons were presented at Zurich, Switzerland, as aforesaid, the market value in Zurich, Switzerland, in lawful [fol. 18] money of the United States of 41,828.50 Swiss francs payable in respect to said 323 coupons, was $13,615.18, said Swiss francs on that day being of the market value of 32.55 cents per Swiss franc.

Sixteenth. On the 1st day of September, 1936, when the 323 coupons numbered 53 referred to in paragraph "Fourteenth" hereof matured, the market value in Zurich, Switzerland in lawful money of the United States of 41,828.50 Swiss francs payable in respect to said 323 coupons was

$13,631.90, said Swiss francs on that day being of the market value of 32.59 cents per Swiss franc.

Seventeenth. There is now due and owing by the defendants to the plaintiff in respect to the 323 coupons, the subject of this Second Cause of Action, the sum of $13,631.90, together with interest thereon from September 7, 1936, no part of which has been paid, although payment thereof has been duly demanded.

Wherefore, plaintiff demands judgment against the defendants in the sum of $61,766.04, together with interest on $48,134.14 thereof from July 15, 1936, with interest on $13,631.90 thereof from September 7, 1936, together with the costs and disbursements of this action.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff, Office and P. O. Address, 15 Broad Street, Borough of Manhattan, New York, N. Y.

(Verified by W. W. Miller, March 24, 1937.)

[fol. 19] EXHIBIT "A," ANNEXED TO COMPLAINT, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Form of Coupon

$25.

On the first day of ——, 19—, unless the bond hereinafter mentioned shall have been duly called for previous redemption, Lackawanna Steel Company will pay to the bearer at its office or agency in the City of New York, U. S. A., Twenty-five Dollars, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M. Germany, M 105, or in Amsterdam, Holland, Gl.62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond Series A, No. —.

$25 U. S. Gold
£5.2.10½ Stg. Marks 105, Guilders 62 Francs 129.50

J. F. Higginson, Treasurer.

Reverse Side

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M, at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

[fol. 20] EXHIBIT "B," ANNEXED TO COMPLAINT, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

$1,000
U. S. Gold

£205.15.2 stg., M.4,200 D.R.W.
Guilders 2,480. Francs 5,180

UNITED STATES OF AMERICA,

State of New York

No. .....

Lackawanna Steel Company

Series A 5% Convertible Series A 5%

First Consolidated Mortgage Gold Bond
Due 1950

Lackawanna Steel Company (hereinafter called the Steel Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, on the first day of March, 1950, One Thousand Dollars in gold coin of the United States of America, or in London, England, £205.15.2 Sterling, or in Frankfort o/M Germany, 4200 Reichmarks, or in Amsterdam, Holland, 2480 Guilders, or 5180 Francs, if paid in France, Belgium or Switzerland, and to pay interest on said principal amount from March 1, 1910, respectively in said respective currencies, at the rate of five per centum per annum, semi-annually, on the first days of March and of September in each year, upon presentation and surrender of the interest coupons hereto annexed, as they severally mature. Payment of the principal and interest of this bond will be made at the office or agency [fol. 21] of the Steel Company in the Borough of Manhattan, in the City of New York, State of New York, in gold coin of the United States of America of the standard of weight and fineness as it existed on March 1, 1910, or at other designated offices in said cities and countries respectively. Both the principal and interest of this bond are payable without deduction for any tax or governmental charge which the

Steel Company or the Trustee under the First Consolidated Mortgage hereinafter mentioned may be required to pay or to retain therefrom under any present or future law of the United States of America or of any state, county or municipality or other taxing authority therein.

This bond is one of an issue of coupon bonds of the Steel Company, known as its First Consolidated Mortgage Gold Bonds, limited to the principal amount of $35,000,000 bearing interest at not exceeding five per cent per annum, payable semiannually, and all issued and to be issued under, and equally secured by, a mortgage and deed of trust dated February 16, 1910, executed by the Steel Company to Union Trust Company of New York, as Trustee, hereinafter termed the First Consolidated Mortgage. For a description of the properties mortgaged and pledged, the nature and extent of the security, the rights of the holders of bonds, and the terms and conditions upon which the bonds are issued and are secured, reference is made to the First Consolidated Mortgage.

This bond is subject to redemption at the option of the Steel Company at a premium of five per cent and accrued interest, on March 1, 1915, or at any time thereafter, on sixty days' prior notice as provided in the First Consolidated Mortgage.

[fol. 22] This bond shall pass by delivery unless registered in the name of the owner on the books of the Steel Company, such registry being noted on the bond by the Steel Company. After such registry, no transfer shall be valid unless made on said books by the registered holder in person or by his attorney duly authorized, and similarly noted on the bond, but the same may be discharged from registry by a transfer thereon to bearer, and thereupon transferability by delivery shall be restored; but this bond may again, from time to time, be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery.

At the option of the holder or registered owner this bond may be converted at its face value, subject to the conditions and regulations prescribed in the First Consolidated Mortgage, into shares of the common stock of the Steel Company at $100 per share of $100 par value during the period beginning March 1, 1912, and ending February 28, 1922.

No recourse shall be had for the payment of the principal or interest of this bond or for any claim based thereon or in respect thereof or of the First Consolidated Mortgage, against any incorporator, stockholder, officer or director of the Steel Company either directly or through the Steel Company whether by virtue of any law or by the enforcement of any assessment or otherwise.

This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate of the trustee under the First Consolidated Mortgage hereon endorsed.

[fol. 23] In Witness Whereof, Lackawanna Steel Company has caused this bond to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or an assistant secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereto, the first day of March, 1910.

Lackawanna Steel Company, by —— ——, Vice-President.

Attest: —— ——, Secretary.

IN SUPREME COURT OF NEW YORK

AMENDED ANSWER OF DEFENDANT BETHLEHEM STEEL COMPANY

The defendant Bethlehem Steel Company, by Cravath, deGersdorff, Swaine & Wood, its attorneys, for its amended answer to the complaint herein:

1. Admits that Lackawanna Steel Company, named in said complaint, formerly was, but denies upon information and belief that it now is, or at the time when this action was begun was, either for the purposes of this suit or otherwise, [fol. 24] a corporation organized and existing under the laws of the State of New York.

2. Admits that Bethlehem Iron Mines Company, named in said complaint, formerly was, but denies upon information and belief that it now is, or at the time when this action was begun was, either for the purposes of this suit or otherwise, a corporation organized, and existing under the laws of the State of New York.

3. Admits that on or about the first day of March, 1910, in the City and State of New York, said Lackawanna Steel Company duly made and, for value received, issued and delivered its First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910, and due March 1, 1950, and that attached to each of said bonds were interest coupons numbered from 1 to 80, inclusive, one of which was payable on the first day of each March and September during the term of said bond, unless, as to any of such coupons, such bond should have been duly called for redemption prior to the maturity date of such coupon. This Defendant admits that a copy of the form of such coupons is attached to the complaint and marked Exhibit A and that a copy of the form of such bond is attached thereto and marked Exhibit B; it refers to the bonds and coupons, respectively, for a statement of the terms thereof, respectively, and except as herein answered, denies each and every allegation contained in paragraph Fifth of said complaint.

4. Denies any knowledge or information sufficient to form a belief as to the allegation contained in paragraph Sixth [fol. 25] of said complaint that the indenture dated October 10, 1922, therein referred to was made for the benefit of the plaintiff as holder of the bonds and coupons mentioned and described in paragraph Eighth of said complaint, and denies the allegation contained in said paragraph Sixth that by said indenture Bethlehem Iron Mines Company therein referred to undertook to perform all the terms and conditions of said bonds.

5. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs Eighth, Ninth, Tenth and Eleventh of said complaint, and in the three unnumbered sections or paragraphs thereof following the paragraph thereof marked "Eleventh" except that this defendant denies that this defendant or said Lackawanna Steel Company or said Bethlehem Iron Mines Company neglected or refused to pay the amount of Swiss francs due on the coupons referred to in said paragraph Ninth, or any of them, and further denies that said coupons were dishonored.

6. Denies each and every allegation contained in paragraph Twelfth of said complaint except that this defendant admits that the sum of $48,134.14 mentioned in said paragraph has not been paid.

7. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs Fourteenth, Fifteenth and Sixteenth of said complaint except that this defendant denies that this defendant or said Lackawanna Steel Company or said Bethlehem [fol. 26] Iron Mines Company neglected or refused to pay the amount of Swiss francs due on the coupons referred to in said paragraph Fourteenth, or any of them, and further denies that said coupons were dishonored.

8. Denies each and every allegation contained in paragraph Seventeenth of said complaint, except that this defendant admits that the sum of $13,631.90, mentioned in said paragraph has not been paid.

For a first separate and complete defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

9. All of the bonds and coupons mentioned and referred to in paragraphs Eighth, Ninth and Fourteenth of said complaint were on and after June 5, 1933, owned by persons resident in the United States.

10. The Swiss franc referred to in said complaint at all times in said complaint mentioned was the gold monetary unit of Switzerland, the country mentioned in said complaint, and was in fact and was provided by the laws of Switzerland to be the equivalent of nine thirty-firsts (9/31) of a gram of fine gold. The interests which the plaintiff alleges that it has in said bonds and coupons were acquired by the plaintiff from residents of the United States with full notice and knowledge of Public Resolution No. 10 of the 73rd Congress entitled "A Joint Resolution to assure uniform value to the coins and currency of the United [fol. 27] States", approved June 5, 1933, with intent to evade the application of said Joint Resolution.

11. By reason of the provisions of Section 5 (b) of an Act of Congress entitled "An Act to define, regulate and punish trading with the enemy and for other purposes," approved October 6, 1917; of an Act of Congress entitled "An act to provide relief in the existing National Emergency in banking, and for other purposes," approved March

9, 1933; of Title III of an Act of Congress entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes", "Title III—Financing—And exercising power conferred by Section 8 of Article I of the Constitution: To coin money and to regulate the value thereof," approved May 12, 1933; of Public Act No. 87 of the Seventy-Third Congress known as "The Gold Reserve Act of 1934," approved January 30, 1934; of executive orders, proclamations and regulations made pursuant to such Acts, and by reason of Public Resolution No. 10 of the Seventy-Third Congress, entitled "A Joint Resolution to assure uniform value to the coins and currency of the United States," approved June 5, 1933, this defendant and said Lackawanna Steel Company and said Bethlehem Iron Mines Company, respectively, have not been at any time since June 5, 1933, and are not now, under [fol. 28] any obligation to make payment in Swiss francs of the interest called for by the coupons referred to in said complaint to the plaintiff.

For a second separate and partial defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

12. This defendant repeats and realleges each and every allegation contained in paragraphs 9, 10 and 11 of this answer with the same force and effect as if herein set forth at length.

13. If this defendant or said Lackawanna Steel Company or said Bethlehem Iron Mines Company was under any obligation upon the maturity of any of the coupons referred to in said complaint to pay said coupons in Swiss francs, they, respectively, were not, and have not since been, and are not now, under any obligation to make payment of the interest called for by said coupons to the plaintiff in Swiss francs exceeding the number equivalent at current rates of exchange on the maturity date of said coupons to the number of dollars, lawful money of the United States of America, specified in said coupons, viz.: Twenty-five dollars ($25) in payment of each such coupon.

For a third separate and complete defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

14. In and by the First Consolidated Mortgage of said Lackawanna Steel Company referred to in the First Consolidated Mortgage Gold Bonds, Series A, of Lackawanna [fol. 29] Steel Company mentioned in said complaint, and *by reference thereto* in said bonds made a part thereof, it was provided, in part, in Section 4 of Article Fourteen of said Mortgage as follows:

"In case any company shall be consolidated with or merged into the Steel Company as aforesaid, or in case the Steel Company shall be so consolidated with or merged into any other corporation, or in case of sale of the property of the Steel Company as an entirety, the corporation formed by such consolidation or into which the Steel Company shall have been merged, or to which such sale shall have been made, upon executing and causing to be recorded an indenture with the Trustee whereby such corporation shall assume the due and punctual payment of all the consolidated bonds and the performance of all the covenants and conditions of this indenture, and charge therewith the property and franchises so taken over, shall succeed to and be substituted for the Steel Company, with the same effect as if it had been named herein as the party of the first part hereto, * * *."

On October 10, 1922, the property of said Lackawanna Steel Company as an entirety was sold by said Lackawanna Steel Company to Bethlehem Iron Mines Company, referred to in said complaint, under its former name of Bethlehem Steel Company of New York, Inc., and as a part of the purchase price of said property of said Lackawanna Steel [fol. 30] Company as an entirety by an indenture dated October 10, 1922, between said Bethlehem Iron Mines Company, then known as Bethlehem Steel Company of New York, Inc., and Central Union Trust Company of New York, which was then the Trustee under and referred to in said Mortgage, as such Trustee, for the benefit of said Trustee, and of the holders for the time being of the bonds secured by said Mortgage, duly executed by said Bethlehem Iron and Steel Company under its said former name, and thereafter duly recorded, said Bethlehem Iron Mines Company

assumed the due and punctual payment of all the Consolidated Bonds issued under said Mortgage and the performance of all the covenants and conditions of said Mortgage, and charged therewith the property and franchises so taken over by said Bethlehem Iron Mines Company. Said Bethlehem Iron Mines Company, pursuant to said provisions of said Mortgage, thereupon succeeded to and was substituted for said Lackawanna Steel Company as the obligor under said Mortgage and in respect of the bonds issued under said Mortgage and secured thereby, including the bonds referred to in said complaint, with the same effect as if said Bethlehem Iron Mines Company had been named in said Mortgage as the party of the first part thereto and as the obligor in each of said bonds, and said Lackawanna Steel Company was thereby, and pursuant to said provision of said mortgage, released and discharged from all obligations and liability under said Mortgage and in respect of any and all of said bonds issued under and secured by said Mortgage.

[fol. 31] 15. On or about December 26, 1936, said Bethlehem Iron Mines Company, by a Certificate of Merger filed in the office of the Secretary of State of New York, was duly merged with this defendant pursuant to the provisions of Section 85 of the New York Stock Corporation Law, and this defendant assumed all the liabilities and obligations of the merged Bethlehem Iron Mines Company and became liable therefor in the same manner as if this defendant had itself incurred such liabilities and obligations, and said Bethlehem Iron Mines Company thereupon ceased to exist and was and is no longer liable upon or under obligation to pay the coupons referred to in said complaint, or any of them.

16. The plaintiff did not exercise or purport to exercise election to receive payment of the coupons referred to in the respective causes of action alleged in said complaint in Swiss francs until after the respective due dates of said coupons; thereby the option, if any, to demand payment thereof in Swiss francs or otherwise than in money of the United States lapsed, and this defendant and said Bethlehem Iron Mines Company have elected and this defendant, as the substituted and sole obligor on said coupons does now elect to pay each of said coupons in money of the United States in the amount of such money therein speci-

fied, but the plaintiff has not presented said coupons for payment in such money of the United States or surrendered or offered to surrender said coupons or any of them upon such payment thereof as provided in said bonds and said coupons.

[fol. 32] For a fourth separate and partial defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

17. This defendant repeats and realleges each and every allegation contained in paragraphs 14, 15 and 16 of this answer with the same force and effect as if herein set forth at length.

18. On the respective due dates of said coupons said Bethlehem Iron Mines Company, as the successor of said Lackawanna Steel Company by virtue of the provisions of said bonds and of said Mortgage and by virtue of said indenture with Central Union Trust Company of New York, as Trustee under said Mortgage, was ready, willing and able to pay said coupons as they respectively became due in money of the United States of America upon presentation and surrender of said coupons, respectively, at the office or agency of said Bethlehem Iron Mines Company in the City of New York in said United States as provided in said bonds and said coupons and in said Mortgage. If, notwithstanding that said coupons have not been presented for surrender and payment in said City of New York, this defendant, or any other corporation named as a defendant in said complaint, is liable herein upon said coupons in any amount, they, respectively, are not liable thereon in an amount in excess of the amount in lawful money of the United States of America specified in said respective coupons, viz., Twenty-five dollars ($25) in payment of each such coupon [fol. 33] and they, respectively, are not liable for interest on any such amount.

Wherefore, this defendant demands judgment dismissing the complaint herein with the costs and disbursements of this action.

Cravath, deGersdorff, Swaine & Wood, Attorneys for defendant Bethlehem Steel Company, No. 15 Broad Street, New York, N. Y.

[Verified by William J. Brown on May 29, 1937.]

IN SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR JUDGMENT

SIRS:

Please take notice that upon the complaint and amended answer herein and upon the affidavit of William W. Miller, sworn to the 1[illegible]h day of September, 1937, the affidavit of A. Sprecher, assistant manager of plaintiff, sworn to the 29th day of July, 1936 and the three (3) affidavits of J. Hunsperger, sworn to the 9th day of September, 1936, the 26th day of April, 1937 and the 15th day of July, 1937 respectively, and the affidavits of Redmond F. Kernan, Jr., and George L. LeBlanc, both sworn to the 14th day of September, 1937, which affidavits are annexed hereto, a motion will be made at a Special Term, Part I of this Court to be held in and for the County of New York, at the County Court [fol. 34] House, in the Borough of Manhattan, City and County of New York, on the 24th day of September, 1937, at the opening of the Court on that day or as soon thereafter as counsel can be heard, for an order striking out the amended answer of the defendant Bethlehem Steel Company on the ground that there is no defense to the action and for judgment for the plaintiff against the defendant, Bethlehem Steel Company, for the relief demanded in the complaint, or for so much of the plaintiff's claim as the defense of the defendant, Bethlehem Steel Company, does not apply to or as is admitted, on such terms as may be just, pursuant to Rules 113 and 114 of the Rules of Civil Practice, and for such other and further relief as to the Court may seem just and proper and for the costs of this motion.

Please take further notice that answering affidavits, if any, in respect to the above motion must be served upon the attorneys for the plaintiff five days before the return date thereof.

Dated, New York, N. Y., September 14, 1937.

Yours, etc., Miller, Owen, Otis & Bailly, Attorneys for Plaintiff, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York.

To Cravath, deGersdorff, Swaine & Wood, Esqs., Attorneys for Defendants, 15 Broad Street, New York, N. Y.

[fol. 35] AFFIDAVIT OF WILLIAM W. MILLER, ANNEXED TO NOTICE OF MOTION, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

William W. Miller, being duly sworn, deposes and says:

I am a member of the firm of Miller, Owen, Otis & Bailly, attorneys of record for the plaintiff herein and I am familiar with all the proceedings had herein.

The summons and complaint in this action were served on the attorneys for the defendant, Bethlehem Steel Company, on April 10, 1937 and said attorneys accepted service thereof for said defendant and served an answer in its behalf on May 13, 1937 and an amended answer on June 1, 1937.

The summons and complaint were served on Lackawanna Steel Company on March 29, 1937. Said defendant's answer was served on May 13, 1937 and its amended answer on June 1, 1937.

The defendant, Bethlehem Iron Mines Company, has not been served.

The defendant, Bethlehem Steel Company, in paragraph 14 of its amended answer, concedes that the defendant, Bethlehem Iron Mines Company, under its former name, Bethlehem Steel Company of New York, Inc., by an indenture dated October 10, 1922 assumed the due and punctual payment of the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, dated March 1, 1910 and due March 1, 1950 and was substituted as the obligor [fol. 36] in respect to said bonds, including the bonds referred to in the complaint.

The defendant, Bethlehem Steel Company, in paragraph 15 of its amended answer, also concedes that by reason of the merger with it of the defendant, Bethlehem Iron Mines Company, on December 26, 1936, it assumed all the liabilities and the obligations of said Bethlehem Iron Mines Company.

This motion for summary judgment is made against the Bethlehem Steel Company only.

This is an action on a contract to recover a liquidated amount for damages for refusal to pay the number of Swiss francs specified in the bearer coupons of Lackawanna Steel

Company which were presented by plaintiff for payment at the agency of the defendants in Zurich, Switzerland.

Each of the coupons upon which this suit is brought was detached from one of the coupon bonds of defendant's predecessor, Lackawanna Steel Company, known as its First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910 and due March 1, 1950.

The affidavit of A. Sprecher, assistant manager of the plaintiff, dated July 29, 1936, and the three (3) affidavits of J. Hunsperger, assistant manager of the plaintiff, dated September 9, 1936, April 26, 1937 and July 15, 1937 respectively, set forth the facts as to the domicile and residence of the plaintiff, the purchase for value of the bonds from which the coupons at bar have been detached prior to the maturity of any of said coupons, the periods during which the purchases were made, the presentation to the paying agent of the defendants at Zurich, Switzerland, of said [fol. 37] coupons for payment in Swiss francs as specified in said coupons, the refusal of said payment, and the dishonoring of the coupons. Attached to the affidavit of A. Sprecher and the affidavit of J. Hunsperger dated September 9, 1936 are appropriate certificates of protest which state the reasons given by the paying agent of defendant as to why the coupons were dishonored.

The original coupons which are the subject of this action will be presented to the Court on the argument of this motion.

There are attached hereto as Exhibits A and B, and made a part hereof, copies of two letters dated January 11, 1934 and August 7, 1934 from Bethlehem Steel Corporation, the parent corporation, of defendants, which letters were sent to the New York Stock Exchange and published in its bulletins of January 13, 1934 and August 11, 1934, respectively. I am informed by representatives of the Amsterdam Stock Exchange and believe that the letter of August 7, 1934 became known in Europe on or about August 22, 1934 as stated in the affidavit of J. Hunsperger dated July 15, 1937.

In the first of these letters, the policies of the defendants in respect to the payment of the coupons is stated to be that the owners of bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto, will receive payment in such countries and in the currencies of such countries in the amount specified in such coupons for such countries. As regards the payment

of interest on bonds owned by those residing in the United States, it was announced in said letter that by reason of [fol. 38] Public Resolution No. 10 of the Seventy-third Congress, approved June 5, 1933, that said coupons would be paid only in lawful money of the United States in the amount specified in the coupons and not in any foreign currency.

In the letter of August 7, 1934, which, as above stated, I am informed became known in Europe on or about August 22, 1934, a change in the policy of the defendants was announced in respect to bonds owned by residents of foreign countries and there were imposed upon such foreign bondholders certain requirements, one of which was the submission with the coupons of an affidavit stating, among other things, that the bond or bonds from which the coupons were detached were owned by a bona fide resident of countries other than the United States continuously since June 5, 1933.

Deponent verily believes that there is no valid defense to this action, and that there is no triable issue presented by the defendant Bethlehem Steel Company's amended answer.

Wherefore, deponent respectfully prays that an order be made striking out said amended answer and that summary judgment be granted to the plaintiff and against the said Bethlehem Steel Company for the relief sought in the complaint, or for so much of plaintiff's claim as the defense of the defendant, Bethlehem Steel Company, does not apply to, or as is admitted, and that such other and further relief be granted as to the Court may seem just and proper, together with the costs of this motion.

(Sworn to by William W. Miller on September 14, 1937.)

[fol. 39] EXHIBIT "A", ANNEXED TO AFFIDAVIT OF W. W. MILLER, ANNEXED TO NOTICE OF MOTION, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Letter dated January 11, 1934 from Bethlehem Steel Corporation as published by the New York Stock Exchange in Bulletin of January 13, 1934.

"Letter has been received from Bethlehem Steel Corporation in regard to payment of coupons upon the following issues:

(1) The First Lien & Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942.

(2) The First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company, assumed by Bethlehem Iron & Steel Corporation, due March 1, 1950.

This letter is quoted in full below.

'Referring to your letter of December 8th, 1933, inquiring as to the policy to be followed with respect to the payment of coupons on certain bond issues expressed to be payable in foreign currencies:

There are two such issues of bonds issued or assumed by our subsidiary companies: (1) the First Lien and Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942, and (2) the First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company assumed by one of our subsidiaries, Bethlehem Iron and Steel Corporation, and due March 1, 1950.

The subject of your inquiry is an important one, not only [fol. 40] to us but to many other interests in this country, and on that account we have been giving a great deal of consideration to it, which has caused our delay in writing you.

The first thing we wish to have clearly understood is that Bethlehem intends fully to perform its obligations with respect to all its bonds. No one should get the contrary idea from the fact that we have not paid in foreign currencies coupons detached from bonds owned by residents of this country. The general question presented is: What are Bethlehem's obligations in respect of them? If, as we hereinafter indicate to be the case, Bethlehem is not legally bound to pay in foreign currencies any of the coupons from bonds owned in this country, then, of course, its officers cannot properly authorize the payment thereof in such currencies.

The apparent purpose of providing for payment of the interest on and the principal of such Bonds in foreign countries was to facilitate their sale and distribution in such countries by enabling residents of such countries who

might purchase any of such Bonds to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts. In accordance with such purpose, we made or will make provision whereby owners of such Bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof in such countries and in the currencies of such countries in the amount specified in such coupons for such countries.

[fol. 41] As regards the payment of the interest on such Bonds owned by those residing in the United States, we call your attention to Public Resolution No. 10 of the Seventy-third Congress, approved June 5, 1933, which among other things in substance declares that every provision in any obligation payable in money of the United States which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or in an amount of money of the United States measured thereby is against public policy and provides that every such obligation (whether or not it contains any such provision) shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

Assuming this Resolution to be applicable to the above-mentioned Bonds, we must regard it as binding upon and the public policy thereby declared applicable to, all residents of the United States, including this Company.

Accordingly, we have paid and shall continue to pay, in accordance with their terms, matured coupons from the above-mentioned Bonds, owned by residents of the United States, in lawful money of the United States, upon presentation and surrender of such coupons at the office of Bethlehem, 25 Broadway, New York City; but the above-mentioned Resolution continuing in effect, we shall deem it our duty to decline to make payment in foreign countries of such coupons to residents of the United States in gold or in any foreign currency, unless and until it has been finally determined and that we are justified in making such payment.' "

[fol. 42] EXHIBIT "B", ANNEXED TO AFFIDAVIT OF W. W. MILLER, ANNEXED TO NOTICE OF MOTION, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

Letter Dated August 7, 1934, from Bethlehem Steel Corporation as Published by the New York Stock Exchange in Bulletin of August 11, 1934

"The following letter has been received from the Bethlehem Steel Corporation under date of August 7, 1934:

'Referring to my letter to you of January 11, 1934, regarding the payment in foreign countries of coupons for interest on the First Lien and Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942, and the First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company assumed by Bethlehem Iron and Steel Corporation and due March 1, 1950:

I am writing to advise you that the respective paying agents for such bonds in the respective foreign countries in which such bonds and the coupons appurtenant thereto are expressed to be payable are being authorized to make payment of such coupons in the currencies of such countries in the respective amounts stated in such coupons when and as such coupons shall be surrendered to such agents for payment in accordance with their terms, but only if such coupons shall be accompanied by

(1) An affidavit signed and sworn to by the owner of the bond or bonds from which such coupons were detached or by a duly authorized representative of such owner on a [fol. 43] date not more than twenty days prior to the date on which such coupons shall be so surrendered and showing:

(a) The number or numbers of the bond or bonds from which such coupons were detached;

(b) The name of the owner of such bond or bonds;

(c) That such owner is at the date of the making of such affidavit, and has been continuously for a period of six months prior to said date, a bona fide resident of a country or countries other than the United States of America; and

(d) That the bond or bonds from which such coupons were detached has or have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933; and

(2) In the case of a non-resident alien of the United States of America, United States Treasury Department Ownership Certificate Form No. 1001 (green) duly filled in and signed by such owner, or, in the case of a national of the United States of America resident of a country other than the United States of America, United States Treasury Department Ownership Certificate Form No. 1000 (White) duly filled in and signed by such owner.

As I pointed out in my letter to you of January 11, 1934, we wish to have it clearly understood that Bethlehem intends fully to perform its obligations with respect to all of [fol. 44] its bonds. So long, however, as Joint Resolution No. 10 of the 73rd Congress, approved June 5, 1933, shall continue in effect, we shall deem it our duty to decline to make payment in foreign countries, in gold or in any foreign currency of coupons from the above-mentioned bonds which were owned by residents of the United States on the date of the approval of such Joint Resolution, unless and until it shall have been finally determined that we are justified in making such payment.

Wm. J. Brown, Treasurer.' ''

AFFIDAVIT OF A. SPRECHER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. A. Sprecher, Assistant Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am an Assistant Manager of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and represent the Zurich General Accident and Liability Insurance Company, Ltd. of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is, and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

[fol. 45] My Company, as aforesaid, prior to September, 1, 1934, purchased for value $283,000 coupon bonds of Lackawanna Steel Company, each of said bonds being known as First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, due March 1, 1950, which bonds are numbered respectively as follows:

111, 173, 185, 251, 258, 277, 322, 393, 452, 535, 546, 565, 604, 633, 677, 684, 692, 822, 834, 863/64, 905, 964, 1007, 1091, 1123, 1258, 1278, 1309, 1355, 1401, 1488/89, 1508, 1560, 1707, 1709, 1783, 1863, 1909, 1951, 1980/81, 2019, 2105, 2107, 2124, 2170, 2180, 2188, 2293, 2344, 2362/63, 2365, 2376, 2406, 2542, 2549, 2572, 2581, 2627. 2654, 2666, 2718, 2795/96, 2839, 2850, 2874, 2879, 3045, 3051, 3094/96, 3123/24, 3135, 3208, 3260, 3272, 3288, 3305/06, 3333, 3356, 3385, 3403, 3469, 3477, 3505, 3557, 3596, 3810, 3834, 3866, 3911/13, 4007, 4024, 4043, 4091/93, 4189/90, 4273, 4289, 4291/92, 4296/97, 4347, 4364/68, 4447, 4456, 4461, 4471, 4476, 4534, 4536, 4553, 4641, 4734, 4753, 4837, 4872, 4894/95, 4936, 5218/20, 5245, 5268, 5371, 5374, 5471, 5483, 5494, 5505, 5543, 5556, 5573, 5648, 5653, 5700, 5755, 5774/75, 5936, 5951, 6024, 6038, 6055, 6142, 6236, 6275, 6293, 6297, 6314, 6368, 6528, 6541, 6590, 6625/26, 6703. 6718. 6732/36, 6804/05, 6834, 6843, 6908, 6929, 6937, 7151, 7157, 7193, 7228/29, 7277, 7400, 7454, 7494, 7506, 7522, 7550/51, 7566, 7576, 7643, 7650, 7727/30, 7788, 7799, 7805, 7807, 7818, 7846, 7879, 8020/22, 8082/84, 8094, 8169, 8174, 8199/8200, 8266, 8270, 8308. 8314, 8317, 8413, 8477, 8482, 8501, 8505, 8511/12, 8542, 8568, 8596, 8621, 8670, 8715, 8851, [fol. 46] 8853, 8860, 8873, 8886, 8905/06, 8917, 9028/29, 9077, 9096, 9113, 9118, 9123, 9171, 9212, 9231, 9233, 9261, 9293, 9304, 9332, 9391, 9422/23, 9429, 9478, 9491, 9671, 9694/95, 9730/31, 9886, 9907, 9914/15, 9966.

At the time said bonds were purchased by my Company, there were appurtenant thereto all interest coupons maturing on and after September 1, 1934, and all said coupons were therefore purchased by my Company for value prior to their respective maturity dates.

I am informed and verily believe that on or about October 10, 1922, Bethlehem Iron and Steel Corporation, a corporation duly organized and existing under the laws of the State of New York, United States of America, the name of which corporation was at that time Bethlehem Steel Company of New York, Inc., acquired by purchase the property of said Lackawanna Steel Company as an entirety and that said

Bethlehem Iron and Steel Corporation for valuable consideration and as part of the purchase price of the said property of Lackawanna Steel Company as an entirety, by an Indenture dated October 10, 1922, between it and Central Union Trust Company of New York as Trustee, for the benefit of said Trustee and for the benefit of affiant as the owner and holder of the bonds and coupons above referred to, assumed the due and punctual payment of the principal and interest of said bonds at the dates and the places and in the manner mentioned in such bonds and in the coupons appurtenant thereto.

Since the purchase of the aforesaid bonds and appurte- [fol. 47] nant coupons, the following coupons have become due and payable: Coupons numbered 49, which matured September 1, 1934, coupons numbered 50, which matured March 1, 1935, coupons numbered 51, which matured September 1, 1935 and coupons numbered 52, which matured March 1, 1936.

My Company, as aforesaid, is now, and ever since the purchase thereof has been, the lawful holder and legal owner of the 283 coupons numbered 49, the 283 coupons numbered 50, the 283 coupons numbered 51 and the 283 coupons numbered 52, which were attached and appurtenant to the aforementioned bonds.

Each of the said coupons is in the following form with the appropriate date of maturity and serial number inserted therein, to wit:

"On the — day of — 193-, unless the bond hereinafter mentioned shall have been duly called for previous redemption, Lackawanna Steel Company will pay to the Bearer at its Office or Agency in the City of New York, U. S. A., Twenty-Five Dollars United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M., Germany, M.105, or in Amsterdam, Holland, Gl.62, or if paid in France, Belgium or Switzerland Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond Series "A".

$25.—U. S. Gold
£5.2.10½ Stg.
Marks 105.—
Guilders 62.—
Francs 129.50.

No. —." J. P. Higginson, Treasurer.

[fol. 48] The paying agents of Bethlehem Iron and Steel Corporation at Zurich, Switzerland, for the payment of the bonds and coupons above mentioned were and are the Schweizerische Kreditanstalt, said firm having been designated as said paying agents by Lackawanna Steel Company and by Bethlehem Iron and Steel Corporation.

On the 15th day of July, 1936, my Company caused each of said 283 coupons numbered 49 and each of said 283 coupons numbered 50 and each of said 283 coupons numbered 51 and each of said 283 coupons numbered 52 to be presented for payment to the Schweizerische Kreditanstalt at Zurich, Switzerland, by Mr. Paul Fischer, Notary Public of the City of Zurich, who thereupon demanded payment against surrender of the said coupons of 146,594.00 Swiss Francs, or 129.50 Swiss Francs for each coupon. Said payment was thereupon refused and upon such coupons being so dishonored, they were protested for non-payment by Paul Fischer, said Notary Public, a photostatic copy of whose certificate of protest, together with a true English translation thereof being attached hereto as Exhibit A and made a part hereof.

My Company has not received payment of the number of Swiss Francs called for in the above described coupons or any of them nor any part thereof and Bethlehem Iron and Steel Corporation still refuses to pay the number of Swiss Francs provided for in said coupons.

To the best of my knowledge and belief, none of the bonds referred to herein has been called for redemption.

The original coupons above described will be produced in court at the appropriate time.

[fol. 49] This affidavit is made in contemplation of and for use in suitable legal proceedings to be instituted for the collection of the damages sustained by affiant by reason of Bethlehem Iron and Steel Corporation's failure to pay said coupons.

(Sworn to by A. Sprecher before the American Vice Consul at Zurich, Switzerland, on July 29, 1936.)

EXHIBIT "A", ANNEXED TO FOREGOING AFFIDAVIT OF A. SPRECHER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This exhibit, which is in the German language, together with an English translation, is a copy of an exemplified

certificate of protest for non-payment of coupons presented on behalf of plaintiff. So much of the exhibit as is in the German language is omitted in printing by stipulation printed herein on page 63.

Attestation by Notary Public

I, Paul Fischer, the undersigned Notary Public of the City of Zurich (Altstadt) hereby certify that to-day I presented on behalf and upon request of the "Zürich" Allgemeine Unfallund Haftpflicht-Versicherungs-Aktiengesellschaft (Zurich General Accident and Liability Insurance Company, Limited) of Zurich, the following coupons, each payable with Gold-dollars 25.—, or Swiss Frs. 129.50, each coupons to a bond of the Lackawanna Steel Company in New York, which bonds are respectively numbered:

[fol. 50] 111, 173, 185, 251, 258, 277, 322, 393, 452, 535, 546, 565, 604, 633, 677, 684, 692, 822, 834, 905, 964, 863, 864, 1007, 1091, 1123, 1258, 1278, 1309, 1355, 1401, 1488, 1489, 1508, 1560, 1707, 1709, 1783, 1863, 1909, 1951, 1980, 1981, 2019, 2105, 2107, 2124, 2170, 2180, 2188, 2293, 2344, 2362, 2363, 2365, 2376, 2406, 2542, 2549, 2572, 2581, 2627, 2654, 2666, 2718, 2795, 2796, 2839, 2850, 2879, 3045, 3051, 3094, 2874, 3095, 3096, 3123, 3124, 3135, 3208, 3260, 3272, 3288, 3305, 3306, 3333, 3356, 3385, 3403, 3469, 3477, 3505, 3557, 3596, 3810, 3834, 3866, 3911/13, 4007, 4024, 4043, 4091/93, 4189, 4190, 4273, 4289, 4291/92, 4296, 4297, 4347, 4364/68, 4447, 4456, 4461, 4471, 4476, 4534, 4536, 4553, 4641, 4734, 4753, 4837, 4872, 4894/95, 4936, 5218/20, 5245, 5268, 5371, 5374, 5471, 5483, 5494, 5505, 5543, 5556, 5573, 5648, 5653, 5700, 5755, 5774, 5775, 5936, 5951, 6024, 6038, 6055, 6142, 6236, 6275, 6293, 6297, 6314, 6368, 6528, 6541, 6590, 6625, 6626, 6703, 6718, 6732/36, 6804/5, 6834, 6843, 6906, 6929, 6937, 7151, 7157, 7193, 7228, 7229, 7277, 7400, 7454, 7494, 7506, 7522, 7550/51, 7566, 7576, 7643, 7650, 7727/30, 7788, 7799, 7805, 7807, 7818, 7846, 7879, 8020/22, 8082/84, 8094, 8169, 8174, 8199, 8200, 8266, 8270, 8308, 8314, 8317, 8413, 8477, 8482, 8501, 8505, 8511, 8512, 8542, 8568, 8596, 8621, 8670, 8715, 8851, 8853, 8860, 8873, 8886, 8905, 8906, 8917, 9028, 9029, 9077, 9096, 9113, 9118, 9123, 9171, 9212, 9231, 9233, 9261, 9293, 9304, 9332, 9391, 9422, 9423, 9429, 9478, 9491, 9671, 9694, 9695, 9731, 9730, 9886, 9907, 9914, 9915, 9966, in all

283 coupons which were due on September 1, 1934,
[fol. 51] 283 coupons which were due on March 1, 1935,
283 coupons which were due on September 1, 1935,
283 coupons which were due on March 1, 1936.

to the Schweizerische Kreditanstalt (Crédit Suisse), domiciled in Zurich, presenting at the same time four Ownership Certificates No. 1001 for the respective bonds, and demanded payment of the amount stated on the Coupons, viz. Swiss Frs. 129.50 for each Coupon.

That thereupon Messrs. Beutl and Gläss, both of them being duly authorized agents of said Bank, empowered to sign jointly, or each of them jointly with another duly authorized officer of said Bank, declared that the Schweizerische Kreditanstalt would redeem the Coupons presented to them on the following conditions:

a. That the coupons presented for payment be accompanied by the Ownership Certificate No. 1001 in case the holder is not a citizen of the United States of America and is domiciled outside of the territory of the United States;

b. That the coupons presented for payment be accompanied by the Ownership Certificate No. 1000 in case the holder is a citizen of the United States of America but is domiciled outside of the Territory of the United States.

and that moreover the coupons presented for payment be accompanied by an affidavit attested to by a duly authorized [fol. 52] officer of the Bank or by a Notary Public, such affidavit being worded as follows:

Affidavit

5% First Consolidated Mortgage Gold Bonds

Series A

Lackawanna Steel Company

The undersigned —— —— (Name) in —— (Address) owner of the bonds from which the following coupons were detached, viz. (Please indicate maturity date of Coupons and number of bonds) — declares that he is and has been continuously for a period of six months prior to this day, a bona fide resident of a country or countries other than the United States of America, and that the bonds from which

such coupons were detached have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933.

Dated ——— —, ——.

(Signature:) ——— ———.

Subscribed, sworn to and acknowledged before me, this — day of ——, ——. ——— ———.

P. S.—The affidavit must be signed on a date not more than twenty days prior to the date on which such coupons shall be surrendered.

[fol. 53] For want of the above described affidavit, the Schweizerische Kreditanstalt, by its above named authorized agents, denied the payment of the interest coupons presented as stated above.

Whereupon I have drawn up this Protest, under reservation of all lawful rights and actions.

Zurich, July 15th, 1936.

Notariat Zürich (Altstadt), Paul Fischer, Notary.
(Seal.)

Frs. 50.— fee,
" 1.— stamp, duty and postage,

Frs. 51 — in all.

AFFIDAVIT, SWORN TO SEPTEMBER 9, 1937, OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. J. Hunsperger, Sub-Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am a Sub-Manager of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and [fol. 54] represent the Zurich General Accident and Liability Insurance Company, Ltd. of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is, and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

My Company, as aforesaid, prior to September 1, 1934, purchased for value $323,000.—coupon bonds of Lackawanna Steel Company, each of said Bonds being known as First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, due March 1, 1950, which bonds are numbered, respectively, as follows:

63, 111, 173, 185, 251, 258, 277, 311, 322, 393, 452, 535, 546, 565, 604, 625, 633, 677, 684, 692, 713, 822, 834, 863/64, 905, 964, 1007, 1018, 1091, 1123, 1198, 1221, 1239, 1257/58, 1278, 1309, 1338/40, 1355, 1401, 1488/89, 1508, 1560, 1575, 1707, 1709, 1783, 1863, 1909, 1951, 1980/81, 2019, 2105, 2107, 2117, 2124, 2170, 2180, 2188, 2293, 2344, 2360, 2362/63, 2365, 2376, 2406, 2542, 2549, 2572, 2581, 2627, 2654, 2657, 2666, 2718, 2795/96, 2839, 2850, 2874, 2879, 3045, 3051, 3084, 3094/96, 3123/24, 3135, 3208, 3226, 3260, 3272, 3288, 3293, 3305/6, 3333, 3356, 3385, 3403, 3469, 3477, 3498, 3505, 3532, 3557, 3596, 3692, 3729/30, 3810, 3834, 3866, 3911/13, 4007, 4024, 4043, 4088/93, 4189/90, 4273, 4289, 4291/92, 4296/97, 4347, 4364/68, 4447, 4456, 4461, 4471, 4476, 4534, 4536, 4553, 4573, 4592/93, 4641, 4734, 4753, 4837, 4872, 4894/95, 4936, 5218/20, [fol. 55] 5245, 5252, 5268, 5276, 5371, 5374, 5471, 5483, 5494, 5505, 5543, 5556, 5573, 5648, 5653, 5700, 5755, 5774/75, 5936, 5951, 6024, 6038, 6055, 6142, 6147, 6236, 6275, 6293, 6297, 6314, 6349/50, 6368, 6528, 6541, 6590, 6597, 6625/26, 6703, 6705/8, 6718, 6732/36, 6804/5, 6834, 6843, 6908, 6929, 6937, 7151, 7157, 7193, 7228/29, 7277, 7400, 7454, 7494, 7506, 7522, 7550/51, 7566, 7576, 7643, 7650, 7727/30, 7788, 7799, 7805, 7807, 7810, 7846, 7879, 8020/22, 8082/84, 8094, 8169, 8174, 8199/200, 8266, 8270, 8308, 8314, 8317, 8413, 8477, 8482, 8501, 8505, 8511/12, 8542, 8568, 8596, 8621, 8670, 8715, 8851, 8853, 8860, 8873, 8886, 8905/6, 8917, 9028/29, 9077, 9096, 9113, 9118, 9123, 9171, 9212, 9231, 9233, 9261, 9293, 9304, 9332, 9391, 9422/23, 9429, 9478, 9491, 9671, 9694/95, 9730/31, 9886, 9907, 9914/15, 9966.

At the time said bonds were purchased by my Company there were appurtenant thereto all interest coupons maturing on and after September 1, 1934, and all said coupons

were therefore purchased by my Company for value prior to their respective maturity dates.

I am informed and verily believe that on or about October 10, 1922, Bethlehem Iron and Steel Corporation, a corporation duly organized and existing under the laws of the State of New York, United States of America, the name of which corporation was at that time Bethlehem Steel Company of New York, Inc., acquired by purchase the property of said [fol. 56] Lackawanna Steel Company as an entirety and that said Bethlehem Iron and Steel Corporation for valuable consideration and as part of the purchase price of the said property of Lackawanna Steel Company as an entirety, by an Indenture dated October 10, 1922, between it and Central Union Trust Company of New York, as Trustee, for the benefit of said Trustee and for the benefit of affiant as the owner and holder of the bonds and coupons above referred to, assumed the due and punctual payment of the principal and interest of said bonds at the dates and the places and in the manner mentioned in such bonds and in the coupons appurtenant thereto.

Since the purchase of the aforesaid bonds and appurtenant coupons, the following coupons have become due and payable: Coupons numbered 49, which matured September 1, 1934, coupons numbered 50, which matured March 1, 1935, coupons numbered 51, which matured September 1, 1935, coupons numbered 52, which matured March 1, 1936 and coupons numbered 53, which matured September 1, 1936.

My Company, as aforesaid, is now, and ever since the purchase thereof has been, the lawful holder and legal owner of the 323 coupons numbered 49, the 323 coupons numbered 50, the 323 coupons numbered 51, the 323 coupons numbered 52 and the 323 coupons numbered 53, which were attached and appurtenant to the aforementioned bonds.

Each of the said coupons is in the following form with the appropriate date of maturity and serial number inserted therein, to wit:

[fol. 57] "On the — day of ——, 193-, unless the bond hereinafter mentioned shall have been duly called for previous redemption, Lackawanna Steel Company will pay to the Bearer at its Office or Agency in the City of New York, U. S. A., Twenty-Five Dollars United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M., Germany, M. 105, or in Amsterdam, Holland, Gl.62 or if

paid in France, Belgium or Switzerl Frs. 129.50, being six months' interest then due on i irst Consolidated Mortgage Gold Bond Series "A".

$25.—U. S. Gold
£5.2.10½ Stg.
Marks 105.
Guilders 62.
Francs 129.50.

J. P. Higginson, Treasurer.

No. —."

The paying agents of Bethlehem Iron and Steel Corporation at Zurich, Switzerland, for the payment of the bonds and coupons above mentioned were and are the Schweizerische Kreditanstalt, said firm having been designated as said paying agents by Lackawanna Steel Company and by Bethlehem Iron and Steel Corporation.

On the 7th day of September, 1936, my Company caused 323 coupons numbered 53 (the coupons numbered 49 to 52 having been presented for payment before) to be presented for payment to the Schweizerische Kreditanstalt at Zurich, [fol. 58] Switzerland, by Mr. Emil Bühler, Substitute of the Notary Public of the City of Zurich (Altstadt), who thereupon demanded payment against surrender of the said coupons of 41,828.50 Swiss Francs, or 129.50 Swiss Francs for each coupon. Said payment was thereupon refused and upon such coupons being so dishonored, they were protested for non-payment by Emil Bühler, said Substitute of the Notary Public, a copy of whose certificate of protest, together with a true English translation thereof being attached hereto as Exhibit A and made a part hereof.

My Company has not received payment of the number of Swiss Francs called for in the above described coupons or any of them nor any part thereof and Bethlehem Iron and Steel Corporation still refuses to pay the number of Swiss Francs provided for in said coupons.

To the best of my knowledge and belief, none of the bonds referred to herein has been called for redemption.

The original coupons above described will be produced in court at the appropriate time.

This affidavit is made in contemplation of and for use in suitable legal proceedings to be instituted for the collection

of the damages sustained by affiant by reason of Bethlehem Iron and Steel Corporation's failure to pay said coupons.

J. Hunsperger.

(Sworn to by J. Hunsperger before the American Vice-Consul at Zurich, Switzerland, on September 9, 1936.)

[fol. 59] EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This exhibit, which is in the German language, together with an English translation, is a copy of an exemplified certificate of protest for non-payment of coupons presented on behalf of plaintiff. So much of the exhibit as is in the German language is omitted in printing by stipulation printed herein at page 93.

Attestation by Notary Public

I, Emil, Bühler, the undersigned Substitute of the Notary Public of the City of Zurich (Altstadt) hereby certify that to-day I presented on behalf and upon request of the "Zürich" Allgemeine Unfall- und Haftpflicht-Versiche-rungs, Aktiengesellschaft ("Zurich" General Accident and Liability Insurance Company, limited) of Zurich, 323 coupons nr. 53, each payable with Gold-dollars 25.-, or Swiss Frs. 129.50, due 1st September 1936 each coupons to a bond of the Lackawanna Steel Company in New York, which bonds are respectively numbered:

63 111 173 185 251 258 277 311 322 393 452 535 546 565 604 625 633 677 684 692 713 822 834 863/64 905 964 1007 1018 1091 1123 1198 1221 1239 1257/58 1278 1309 1338/40 1355 1401 1488/89 1508 1560 1575 1707 1709 1783 1863 1909 1951 1980/81 2019 2105 2107 2117 2124 2170 2180 2188 2293 2344 2360 2362/63 2365 2376 2406 2542 2549 2572 2581 2627 2654 2657 2666 2718 2795/96 2839 2850 2874 2879 3045 3051 3084 3094/96 3123/24 3135 3208 3226 3260 3272 3288 3293 3305/06 3333 3356 3385 3403 3469 [fol. 60] 3477 3498 3505 3532 3557 3596 3692 3729/30 3810 3834 3866 3911/13 4007 4024 4043 4088/93 4189/90 4273 4289 4291/92 4296/97 4347 4364/68 4447 4456 4461 4471 4476 4534 4536 4553 4573 4592/93 4641 4734 4753 4837 4872 4894/95 4936 5218/20 5245 5252 5268 5276 5371 5374 5471 5483 5494 5505 5543 5556 5573 5648 5653 5700 5755 5774/75

5936 5951 6024 6038 6055 6142 6147 6236 6275 6293 6297 6314 6349/50 6368 6528 6541 6590 6597 6625/26 6703 6705/08 6718 6732/36 6804/05 6834 6843 6908 6929 6937 7151 7157 7193 7228/29 7277 7400 7454 7494 7506 7522 7550/51 7566 7576 7643 7650 7727/30 7788 7799 7805 7807 7818 7846 7879 8020/22 8082/84 8094 8169 8174 8199/200 8266 8270 8308 8314 8317 8413 8477 8482 8501 8505 8511/12 8542 8568 8596 8621 8670 8715 8851 8853 8860 8873 8886 8905/06 8917 9028/29 9077 9096 9113 9118 9123 9171 9212 9231 9233 9261 9293 9304 9332 9391 9422/23 9429 9478 9491 9671 9694/95 9730/31 9886 9907 9914/15 9966

to the Schweizerische Kreditanstalt (Crédit Suisse), domiciled in Zurich, presenting at the same time Ownership Certificate Nr. 1001 for the respective bonds, and demanded payment of the amount stated on the Coupons, viz. Swiss Frs. 129.50 for each Coupon.

That thereupon Messrs. Beutl and Gläss, both of them being duly authorized agents of said Bank, empowered to sign jointly, or each of them jointly with another duly authorized officer of said Bank, declared that the Schwei- [fol. 61] zerische Kreditanstalt would redeem the coupons presented to them on the following conditions:

a. That the coupons presented for payment be accompanied by the Ownership Certificate Nr. 1001 in case the holder is not a citizen of the United States of America and is domiciled outside of the territory of the United States;

b. That the coupons presented for payment be accompanied by the Ownership Certificate Nr. 1000 in case the holder is a citizen of the United States of America but is domiciled outside of the Territory of the United States.

and that moreover the coupons presented for payment be accompanied by an affidavit attested to by a duly authorized officer of the Bank or by a Notary Public, such affidavit being worded as follows:

Affidavit

5% First Consolidated Mortgage Gold Bonds

Series A

Lackawanna Steel Company

The undersigned —— —— (Name) in —— (Address) owner of the bonds from which the following coupons were

detached, viz. (Please indicate maturity date of Coupons and numbers of bonds) declares that he is and has been continuously for a period of six months prior to this day, a bona fide resident of a country or countries other than the United States of America, and that the bonds from [fol. 62] which such coupons were detached have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933.

Dated —— —, ——.

(Signature) —— ——.

Subscribed, sworn to and acknowledged before me, this — day of ——. ——.

P. S.—The affidavit must be signed on a date not more than twenty days prior to the date on which such coupons shall be surrendered.

For want of the above described affidavit, the Schweizerische Kreditanstalt, by its above named authorized agents, denied the payment of the interest coupons presented as stated above.

Whereupon I have drawn up this Protest, under reservation of all lawful rights and actions.

Zurich, September 7th, 1936.

Notariat Zürich (Altstadt), E. Bühler, Notary Public of ——. (Seal.)

Frs. 50.—fee,
" 1.—stamp, duty and postage,

Frs. 51.—in all.

[fol. 63] AFFIDAVIT, SWORN TO APRIL 26, 1937, OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. J. Hunsperger, Sub-Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am a Sub-Manager, of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and represent the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

My Company, as aforesaid, prior to September 1, 1934, purchased for value $323,000 coupon bonds of Lackawanna Steel Company, each of said bonds being known as First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, due March 1st, 1950, each bond certificate bearing a statement to the effect that its face value is $1,000 U. S. Gold, or £205.15.2 Stg., or M. 4,200 D.R.W., or Guilders 2,480, or Francs 5,180.

My Company, as aforesaid, acquired the said bonds as hereafter stated:

Bought from Mackay & Co., Brokers in New York City, Otherwise the Former Owner Not Being Known

[fol. 64]

$100,000.—twelve different purchases made between November 9th, 1933 and December 13th, 1933; from Mackay & Co., Brokers in New York City, otherwise the former owner not being known,

$198,000.—fifty-one different purchases made between January 11th, 1934, and August 22nd, 1934; from American Express Company in Zurich, Switzerland otherwise the former owner not being known.

$ 25,000.—purchased August 9th, 1934.

$323,000.—in all.

This affidavit is made for use in a pending legal proceeding instituted for the collection of the damages sustained by the affiant by reason of Bethlehem Iron and Steel Corporation's—as Successors of Lackawanna Steel Company—

failure to pay the coupons on above bonds in Swiss Francs or in Dutch Guilders.

J. Hunsperger, Sub-Manager.

(Sworn to by J. Hunsperger before American Vice Consul at Zurich, Switzerland, on April 26, 1937.)

[fol. 65] AFFIDAVIT, SWORN TO JULY 15, 1937, OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. J. Hunsperger, Sub-Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am a Sub-Manager of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and represent the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

On January 11th, 1934, the Bethlehem Steel Corporation of New York Incorporated in a letter addressed to the Committee of the New York Stock Exchange declared it to be their intention fully to perform its obligations with respect to all its bonds of the following issues:

Bethlehem Steel Company 5% 1942
Lackawanna Steel Company 5% 1950

and stated that provisions have been or will be made to the effect that holders residing outside of the United States of America will be enabled to receive the value of their coupons in the respective foreign exchanges.

[fol. 66] In a letter dated August 7th, 1934, to the Committee of the New York Stock Exchange, the Company revised this standpoint or rather assured that its letter of January 11th, 1934, had been misinterpreted and that it

had been their intention that exclusively foreign holders who had obtained their bonds prior to June 5th, 1933, were entitled to exercise the option of payment in Dollars or Guilders.

As stated in my affidavit of April 20th, 1937, my Company acquired in the time between January 11th, 1934 (date of the first letter of Bethlehem Steel Company to the New York Stock Exchange), and August 22nd, 1934 (date at which the second letter of the Bethlehem Steel Company to the New York Stock Exchange became known in Europe), an amount of $223,000.—Lackawanna Steel Company 5% 1950 in 52 different purchases, the first purchase having been effected on April 25th, 1934, the last one on August 9th, 1934.

At the time when these bonds were purchased, my Company was aware of the policy and practice of Bethlehem Steel Company in making payments to foreign holders of coupons in the foreign currencies specified without regard to the time of acquisition of the bonds and that the coupons of Lackawanna bonds which matured as late as March 1st, 1934, were so paid. Furthermore, my Company was aware of and relied upon a letter of Bethlehem Steel Company to the New York Stock Exchange dated January 11th, 1934, in which it was stated that Bethlehem Steel Company had made or would make provisions whereby owners of Lackawanna and Bethlehem bonds residing in foreign countries [fol. 67] would receive payment in such countries and in the currencies specified in the coupons. On the other hand, the letter of August 7th, 1934, in which the Bethlehem Steel Company declared that it would pay only on the conditions therein stated, was not known to my Company when the above stated purchases were effected.

This affidavit is made for use in a pending legal proceeding instituted for the collection of the damages sustained by the affiant by reason of Bethlehem Iron and Steel Corporation's—as Successors of Lackawanna Steel Company—failure to pay the coupons on the above bonds in Swiss Francs or in Dutch Guilders.

(Sworn to by J. Hunsperger before American Vice Consul at Zurich, Switzerland, on July 15, 1937.)

AFFIDAVIT OF GEORGE L. LEBLANC, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

George L. LeBlanc, being duly sworn, deposes and says:

I am an advisor in currency matters, including foreign exchange, with offices at 44 Wall Street, in the City of New York.

From 1912 to 1914 I was Manager of the Foreign Department of the American Express Company in New York. [fol. 68] From 1914 to 1929 I was Manager and from 1916 to 1929 I was Vice-President of the Foreign Department of the Equitable Trust Company of New York, which conducted one of the largest businesses in foreign exchange in the world. From 1920 to 1929 I was President of the Equitable Eastern Banking Corporation of New York. From 1929 to 1930 I was President of the Interstate Trust Company of New York. From 1930 to the present as an advisor in matters of currency and foreign exchange, I have at all times been interested in and concerned with the money markets of the world and various currency fluctuations in them.

I have had wide experience trading in foreign exchange, and have bought and sold foreign currencies. During my entire connection with the business of foreign exchange I have been and am familiar with the prices generally at which Swiss francs have sold in New York. As part of my work, I have been and am familiar with dollar prices generally in world markets and I have been and am familiar with the prices at which the dollar has sold in Zurich, Switzerland.

The Bank and Quotation Record, a monthly publication published by William B. Dana Company, 25 Spruce Street, New York, N. Y., which firm also publishes the Commercial and Financial Chronicle, a weekly publication, is relied upon in the trade by dealers in foreign exchanges generally as accurate in its quotations of the market values of foreign exchange and said quotations are accepted by such dealers as authentic. These quotations are compiled by William B. Dana Company from records of actual trans- [fol. 69] actions by various dealers in foreign exchange on the days for which the quotations are given. The values given in United States currency for cable rates for Swiss

francs in New York are generally equivalent to the value of the dollar in Zurich, Switzerland on the corresponding day. Any slight differences between the value of the Swiss franc in New York and the value of the dollar in Zurich Switzerland, are quickly adjusted during the day.

During the period from March 1, 1934 through September 8, 1936, the rates of exchange between the dollar and the Swiss franc were so stable that any difference between the value of the Swiss franc in New York and the value of the dollar in Zurich, Switzerland at any particular time was practically negligible.

On the basis of the above facts, as stated in this affidavit, and on the basis of my past experience trading in foreign exchange as well as my experience as an advisor in currency matters, and in the light of my knowledge of the value of the dollar in Zurich, Switzerland, I conclude and it is my opinion that the quotation of the lowest values of the Swiss franc in New York, either check or cable rates, on any particular day during the above period, as indicated in the Bank and Quotation Record, corresponded with and were equivalent to the lowest value of the Swiss franc in terms of the dollar in Zurich, Switzerland on the date of said quotation.

[Sworn to by George L. LeBlanc on September 14, 1937.]

[fol. 70] AFFIDAVIT, SWORN TO SEPTEMBER 14, 1937, OF REDMOND F. KERNAN, JR., READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Redmond F. Kernan, Jr., being duly sworn, deposes and says: I am an attorney at law admitted to practice in the Supreme Court of the State of New York and am associated with Miller, Owen, Otis & Bailly, No. 15 Broad Street, New York, N. Y., attorneys for the plaintiff in the above entitled action.

This action is for damages for breach of contract to pay to the plaintiff 129.50 Swiss francs per coupon in respect of coupons of Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, Series A, due March 1, 1950,

which plaintiff caused to be presented for payment at the agency of the defendant Schweizerische Kreditanstalt at Zurich, Switzerland, and which defendant, through its said paying agency, refused to pay.

In order to determine the market value in lawful money of the United States of the number of Swiss francs which the plaintiff was entitled to receive in respect of the aforesaid coupons, I have examined various issues of the Bank and Quotation Record, financial publication published by William B. Dana Company, 25 Spruce Street, New York, N. Y., and found in said publication the quotations listed below to be the lowest for either check or cable rates on the dates of maturity and dates of presentation of the coupons or on the first business day subsequent to such dates. [fol. 71] The following are the lowest values in United States currency of the Swiss franc on the dates of maturity and the dates of presentation of the coupons which are the subject of the first cause of action:

Date of Maturity	Lowest value in cents of Swiss Franc
September 1, 1934	33.13
March 1, 1935	32.60
September 3, 1935 (September 1, 1935 being Sunday and September 2, 1935 being Labor Day)	32.55
March 2, 1936 (March 1, 1936 being Sunday)	33.06
Date of Presentation	
July 15, 1936	32.75

The following are the lowest values in United States currency of the Swiss franc on the dates of maturity and dates of presentation of the coupons which are the subject of the second cause of action:

Date of Maturity	Lowest value in cents of Swiss Franc
September 1, 1936	32.59
Date of Presentation	
September 8, 1936 (September 7, 1936 being Labor Day)	32.55

The amount of damages claimed in both the first and second causes of action are based upon the lowest value of the Swiss franc on the dates of maturity, which dates have heretofore been adopted by this Court as the proper dates for calculating said damages. The lowest values on the dates [fol. 72] of presentation are also inserted herein to indicate the slight variation in such rates between the dates of maturity and the dates of presentation and in the event that the Court should deem it proper to assess damages as of the dates of presentation.

(Sworn to by Redmond F. Kernan, Jr., on September 14, 1937.)

AFFIDAVIT, SWORN TO SEPTEMBER 23, 1937, OF REDMOND F. KERNAN, JR., READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Redmond F. Kernan, Jr., being duly sworn deposes and says: I am an attorney at law and admitted to practice in the Courts of the State of New York and am associated with Miller, Otis & Bailly, attorneys for the plaintiff in the above entitled action.

This action is brought for the recovery of damages for defendants' failure to pay to the plaintiff 129.50 Swiss francs in respect to each of 1455 coupons detached from Lackawanna Steel Company First Consolidated Mortgage Gold Bonds Series A, due March 1, 1950 in the principal amount of $1000 each.

The first cause of action is on 1132 coupons detached from 283 of said Lackawanna Steel Company Bonds, said coupons [fol. 73] constituting for maturities September 1, 1934, March 1, 1935, September 1, 1935 and March 1, 1936, the coupons being numbered respectively, 49, 50, 51 and 52.

The second cause of action is on 323 coupons detached from 323 Lackawanna Steel Company Bonds which coupons mature September 1, 1936 and which are No. 53. The serial numbers of the 283 Bonds, the coupons of which are the subject of the first cause of action, are contained in the affidavit of A. Sprecher, dated July 29, 1936, in support of the motion for summary judgment herein and the serial numbers

of the 323 bonds, the coupons of which are the subject of the second cause of action, are stated in the affidavit of J. Hunsperger, dated September 9, 1936, in support of the motion for summary judgment. The coupons numbered 49, 50, and 51 detached from the forty (40) bonds involved in the second cause of action but not in the first cause of action, have been paid by the defendant, Bethlehem Iron Mines Company (formerly Bethelehem Iron and Steel Corporation), pursuant to a judgment of this Court entered June 29, 1936 on an order of Mr. Justice Hofstadter granting summary judgment to the plaintiff for damages for the defendants' failure to pay to the plaintiff 129.50 Swiss francs in respect to each of said coupons. The amount of damages have been calculated in United States currency on the basis of the value of the Swiss franc in dollars on the dates of maturity of the coupons. The case in which said summary judgment was granted is Zurich General Accident & Liability Insurance Company, Ltd., plaintiff, vs. Bethlehem [fol. 74] Iron and Steel Corporation, defendant, Index No. 12479-1936. The serial numbers of the forty (40) bonds from which the coupons, the subject of said action, were detached are as follows:

63, 1018, 1198, 1338/40, 2117, 4573, 4592, 4593, 5252, 5276, 6147, 6349, 6350, 6597, 6705/08, 311, 625, 713, 1221, 1239, 1257, 1557, 2360, 2657, 3084, 3226, 3293, 3498, 3532, 3692, 3729, 3730, 4088/90.

See affidavit of A. Sprecher, sworn to November 26, 1935, at pages 45 to 49 of the printed papers on appeal from order and judgment in said action. The amount of the judgment entered against the defendant in said action was $5300.97, consisting of the value of the 129.50 Swiss francs, payable in respect to each of the 120 coupons, based on the rate of exchange between the Swiss franc and the dollar on the dates of maturity of the coupons, or $5082.72, plus interest thereon in the sum of $190, together with costs in the sum of $28.25.

The defendant took an appeal from said judgment of this Court and served printed copies of papers on appeal but abandoned the appeal before argument and paid the full amount of the judgment.

A copy of the papers on appeal from the order and judgment in the above referred to action will be handed to the

Court on the argument of the motion for summary judgment of this action.

Redmond F. Kernan, Jr.

(Sworn to by Redmond F. Kernan, Jr., on September 23, 1937.)

[fol. 75] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF WILLIAM J. BROWN, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

William J. Brown, being duly sworn, deposes and says:

I am an Assistant Treasurer of the defendant Bethlehem Steel Company and am familiar with the financial affairs and records of the defendant.

The coupons upon which this suit has been instituted are coupons detached respectively from $1,000 coupon bonds known as Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910 and due March 1, 1950 (which are hereinafter referred to as Gold Bonds, Series A) of the face amount of $10,000,000, that were issued in 1910, the proceeds of the sale thereof together with the proceeds of the sale of certain Five Year Five Per Cent. Convertible Gold Bonds of said Company issued simultaneously with said Gold Bonds, Series A, to be first applied to the payment of $10,000,000 face amount, of Gold Notes of said Company which matured March 1, 1910, and $5,000,000, face amount, of Secured Gold Notes of said Company, which also matured on March 1, 1910. A photostatic copy of the form of said Gold Bonds, Series A (showing the face and reverse sides of said form), is annexed hereto as Exhibit A and made a part hereof. A photostatic copy of the form of coupons appurtenant to said Bonds, which shows the face and reverse sides of the form [fol. 76] of the second page of said coupons, is annexed hereto as Exhibit B and made a part hereof.

Said $10,000,000, face amount, of Gold Bonds, Series A, were a part of an authorized issue of $35,000,000, face amount, of Consolidated Mortgage Gold Bonds, and were sold on or about March 1, 1910, partly to stockholders of

said Lackawanna Steel Company and partly to a group of bankers represented by Speyer & Co. of the City of New York.

I am informed and believe that the property and business of said Lackawanna Steel Company at time of the issue of Gold Bonds, Series A, was almost entirely, if not altogether, located and conducted in the United States, and that the $10,000,000, face amount, of said Bonds were issued and sold by said Lackawanna Steel Company in pursuance of a comprehensive plan which provided for the payment of the $15,000,000 Gold Notes maturing on March 1, 1910, and for future financial requirements of said Lackawanna Steel Company in respect of additions and improvements to its property. I am further informed and believe that the facts stated in this paragraph were made known by the President of said Lackawanna Steel Company to said Speyer & Co. on or about March 1, 1910, and were in turn made known by Speyer & Co. and the others composing the group of bankers represented by Speyer & Co. to prospective purchasers of said Gold Bonds, Series A, when they were offered for sale.

On or about October 10, 1922, Bethlehem Iron Mines Company, which is named in the complaint in this action, under its former name of Bethlehem Steel Company of New York, Inc. purchased the properties of said Lackawanna [fol. 77] Steel Company as an entirety and as a part of the purchase price thereof entered into an indenture dated the 10th day of October, 1922, with Central Union Trust Company of New York, which has succeeded by merger to all the rights and powers of Union Trust Company of New York as Trustee under the First Consolidated Mortgage by which the Gold Bonds, Series A, were secured, whereby Bethlehem Iron Mines Company assumed the due and punctual payment of all the Gold Bonds, Series A, issued under said Mortgage, and the performance of all the covenants and conditions of said Mortgage, and charged therewith the property and franchises so taken over by said Bethlehem Iron Mines Company. On or about December 26, 1936, said Bethlehem Iron Mines Company, by Certificate of Merger filed in the office of the Secretary of State of New York, was duly merged with this defendant pursuant to the provisions of Section 85 of the New York Stock Corporation Law, and this defendant assumed all the liabilities and obligations of the merged Bethlehem Iron Mines Company and became

liable therefore in the same manner as if this defendant had itself incurred such liabilities and obligations.

The coupons upon which this suit has been instituted matured, respectively, on September 1, 1934, March 1, 1935, September 1, 1935, March 1, 1936, and September 1, 1936. On each of said coupon maturity dates, there were $6,492,000, face amount, of said Gold Bonds, Series A, outstanding in the hands of the public, with an additional $291,000, face amount, of said Bonds held in the treasury of Bethlehem Iron Mines Company.

[fol. 78] The plants and properties of said Bethlehem Iron Mines Company, with exception of certain Iron ore properties owned by it in Cuba, were, on the respective maturity dates of the coupons involved in this action, located in the United States and if was not, except as to the ownership of said iron ore properties in Cuba, engaged in business outside of the United States and did not in the normal course of business have pounds sterling available in London or Reichsmarks in Frankfort-on-Main, Germany, or guilders in Amsterdam, Holland, or francs in France, Belgium or Switzerland, with which to pay the coupons on said Gold Bonds, Series A. The same facts were and are true as to the defendant Bethlehem Steel Company, at the date of its aforesaid merger with Bethlehem Iron Mines Company and at the present time.

I am informed and believe that all of the Bonds and coupons mentioned in the complaint in this action were, on and after June 5, 1933, owned by persons resident in the United States, and that the interests which the plaintiff alleges that it has in said Bonds and coupons, were acquired by the plaintiff from residents of the United States with full notice and knowledge of Public Resolution No. 10 of the 73rd Congress, entitled "A Joint Resolution to assure uniform value to the coins and currency of the United States" approved June 5, 1933, with intent to evade the application of said Joint Resolution. The source of my information and ground for my belief is the admission made in the plaintiff's motion papers that all of the Bonds and coupons involved in the action were purchased either from New York City brokers or from an American company (affi-[fol. 79] davit of J. Hunsperger, verified April 26, 1937) and the further admission that $223,000, face amount, of said Gold Bonds, Series A, were purchased by the plaintiff

with full knowledge of the contents of a letter written by Bethlehem Steel Corporation to the New York Stock Exchange (a copy of which is annexed to the affidavit of William W. Miller in support of the motion, as Exhibit A) which referred specifically to the Joint Resolution and stated the belief of the said Corporation that said Joint Resolution was applicable to said Bonds and binding upon said Corporation.

With respect to the statements in various affidavits in support of the motion as to the terms of the Consolidated Mortgage Gold Bonds, Series A, and of the coupons appurtenant thereto (Hunsperger affidavit of July 29, 1936, pp. 3-4; Hunsperger affidavit of September 9, 1936, p. 3; Hunsperger affidavit of April 26, 1937, p. 1;), I respectfully refer the Court to Exhibits A and B attached hereto for a true statement of the terms thereof.

Wm. J. Brown.

(Sworn to by William J. Brown on September 17, 1937.)

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF WILLIAM J. BROWN, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

This exhibit is a photostatic copy of a specimen form, front and back of a $1,000 Lackawanna Steel Company First Consolidated Mortgage 5% bond, Series A of 1950. The text of the front of this form is printed herein at pages 20 to 23 as Exhibit B to the complaint.

[fol. 80] EXHIBIT B, ANNEXED TO FOREGOING AFFIDAVIT OF WILLIAM J. BROWN, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

This exhibit is a photostatic copy of the form of front and reverse sides of the second page of coupons appurtenant to the form of bond contained in Exhibit A. The text of these forms is printed herein at page 19 as Exhibit A to the complaint.

In Supreme Court of New York

Affidavit of William F. Majory, Read in Opposition to Plaintiff's Motion for Summary Judgment.

State of New York,
County of New York, ss:

William F. Majory, being duly sworn, deposes and says:

I am a clerk in the office of the Assistant Treasurer of the defendant Bethlehem Steel Company. This affidavit is made to supplement the affidavit of William J. Brown verified September 17, 1937, in opposition to the plaintiff's motion for summary judgment. At pages 4 and 5 of Mr. Brown's affidavit, he stated that he was informed and believed that all of the bonds and coupons mentioned in the complaint in this action were, on and after June 5, 1933, owned by persons resident in the United States, and he further stated that his belief was based upon certain admissions made in the affidavits submitted in support of this motion.

[fol. 81] The following facts present further evidence that the 323 bonds and coupons referred to in the complaint were owned by American residents on and after June 5, 1933:

I have examined the records of the defendant Bethlehem Steel Company, including the records formerly of Bethlehem Iron Mines Company, to ascertain whether the coupons from said 323 bonds which matured immediately before and immediately after June 5, 1933 (the date of the Joint Resolution), were paid in New York or abroad. Such records show that all of the coupons maturing March 1, 1933 (the maturity date immediately preceding June 5, 1933), which were appurtenant to said 323 bonds, were paid in New York. They also show that the coupons appurtenant to 319 of said bonds maturing September 1, 1933 (the first maturity date after June 5, 1933) were paid in New York, and that only the remaining 4 coupons appurtenant to bonds involved in this action and maturing on September 1, 1933 were paid abroad. On the next maturity date, March 1, 1934, the plaintiff claims to have already become the owner of 100 of said 323 bonds (affidavit of J. Hunsperger, verified April 26, 1937, p. 1). However, only 96 coupons, of the 323 coupons maturing on that date, were paid abroad. The balance of 227 coupons were paid in New York.

I recognize that the fact that coupons were paid in New York does not necessarily show that the owners of such coupons were American residents at the time of payment, since a foreign resident might have sent his coupons to New York for payment. However, the inference of American owner- [fol. 82] ship of the coupons which is to be drawn from the fact that they were paid in New York becomes very strong when the further fact is considered that foreign owners receiving payment of their coupons in either Swiss francs or guilders would, on each of the three maturity dates, have received more than the $25 payable on said coupons in New York. The values of Swiss francs and guilders on the respective maturity dates are set forth in the affidavit of Robert D. Blasier which is submitted herewith. If those figures are used to compute the value of 129.50 Swiss francs and 62 guilders (these being the amounts of francs and guilders specified in the coupons), the premium in excess of $25 per coupon which a foreigner would secure, if payment were made in such currencies, appears in the following table:

Date of Maturity of Coupon	Dollar Value of 62 Guilders	Dollar Value of 129.50 Swiss Francs
March 1, 1933	$25.07	$25.28
Sept. 1, 1933	35.62	35.75
March 1, 1934	41.60	41.72

Since it would not only have been more convenient but also more profitable for foreign owners to present and receive payment of their coupons maturing on the aforementioned three dates in guilders or Swiss francs, it is very unlikely that any foreign owners sent their coupons to New York for payment. The inference is strong, therefore, that such coupons of the aforementioned maturities as were presented and paid in New York, were owned by American residents and not by foreigners at the time of payment.

William F. Majory.

(Sworn to by William F. Majory on September 22, 1937.)

[fol. 83] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF ROBERT D. BLASIER, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Robert D. Blasier, being duly sworn, deposes and says:

I am associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys of record for the defendant, Bethlehem Steel Company.

I have examined various issues of the Bank and Quotation Record, the financial publication referred to in the affidavits of George Le Blanc and Redmond F. Kernan, Jr., which have been submitted in support of plaintiff's motion for summary judgment. My examination of that publication has been made for the purpose of ascertaining the lowest values in United States currency of the Dutch Guilder, and the Swiss Franc on the following maturity dates of coupons appurtenant to Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, Series A: March 1, 1933, September 1, 1933, and March 1, 1934. The March 1, 1933 maturity date was the last maturity date prior to the enactment of the "Joint Resolution to assure uniform value to the coins and currency of the United States" on June 5, 1933, which is referred to in paragraph 10 of the amended answer of Bethelehem Steel Company, and the September 1, 1933 and March 1, 1934 maturity dates were, respectively, the maturity dates next succeeding the enactment of said Joint Resolution.

[fol. 84] The quotations listed below, which are taken from the Bank and Quotation Record, are the lowest values in United States currency of the respective foreign currencies, for either check or cable rates, on the respective maturity dates:

Date of Maturity	Guilders (Amsterdam)	Swiss Francs
Mar. 1, 1933	$.4043	$.19525
Sept. 1, 1933	$.5745	$.2761
Mar. 1, 1934	$.6709	$.3222

Robert D. Blasier.

(Sworn to by Robert D. Blasier on September 22, 1937.)

IN SUPREME COURT OF NEW YORK

OPINION BY MR. JUSTICE ROSENMAN

164 Misc. Rep. 498

By Mr. Justice ROSENMAN:

This is a motion for summary judgment by the holder of a large number of matured coupons appurtenant to bonds issued by the Lackawanna Steel Company, the payment of which has been assumed by the defendant Bethlehem Steel Company. The coupons provide that the obligor "will pay to the bearer at its office or agency in the City of New York, U. S. A., Twenty-five Dollars, United States Gold, or in London, England £5.2.10½ Sterling, or in Frankfort o/M., Germany, M. 105, or in Amsterdam, Holland, Gl.62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being [fol. 85] six months' interest then due on its First Consolidated Mortgage Gold Bonds Series A."

The plaintiff presented its coupons for payment in Switzerland and demanded payment in Swiss francs. The defendant refused to meet the demand, and the plaintiff has brought this action to recover the dollar value of the Swiss francs which it claims should have been paid when these coupons were presented for payment.

The plaintiff's demand is for a sum substantially in excess of the number of United States dollars called for by the coupons, as a result of the devaluation of the American currency which took place in 1933 and 1934. This premium the defendant has refused to pay. The defendant is willing to pay the twenty-five dollars in present American currency, as called for in the coupons. If the plaintiff prevails, instead of receiving twenty-five dollars for each coupon, it will receive a much greater amount. The defendant's position is that the joint resolution of the Congress, dated June 5, 1933 (Public Resolution No. 10, 73d Congress; 48 U. S. Stat. at Large, 113; U. S. Code, tit. 31, § 463), permits it to discharge its obligation to its bondholders by payment, dollar for dollar, in legal tender. The defendant also resists summary judgment on the further contention that the plaintiff purchased these coupons from American holders after June 5, 1933, for the sole purpose of evading the provisions of the joint resolution, on the theory that, although

American citizens might be bound by the terms of the resolution, foreigners would not be so bound.

The plaintiff's contention is that the joint resolution does not cover these coupons in so far as they are payable in alternative currencies.

An analysis of the joint resolution will disclose that it re-
[fol. 86] lates to two independent subjects, both of which may or may not be included in any one particular instrument.

It relates to every "*obligation*" payable in money of the United States. It relates also to "*provisions*" in any obligation which give the obligee a right to demand payment in gold.

With respect to such "obligations," it provides that they shall be payable, dollar for dollar, in any legal tender. With respect to such "provisions," it provides that every one of them, past, present or future, shall be void as against public policy. And it further provides that every obligation is payable, dollar for dollar, in legal tender even though there be not included in the obligation such a provision to pay in gold.

In each of the coupons involved in this suit there is the "provision" about payment in gold. In each of them there is also an "obligation payable in money of the United States," but there is also contained in them a further provision about payments in alternative currencies. Therefore, both of these main subjects which are treated by the joint resolution are included in the one obligation, i. e., the coupon.

The joint resolution says that the first provision is void as against public policy. The question presented here is whether the provision for payments in alternative currencies may be enforced. It may not be enforced if the joint resolution says it may not, for the joint resolution has been upheld as a valid exercise of the Congressional power to regulate the currency of the United States. (Norman v. Baltimore & O. R. R. Co., 294 U. S. 240.)

The joint resolution by its very terms covers "every obli-
[fol. 87] gation," which is defined as "every obligation payable in money of the United States." This language is broad enough to cover these coupons, even though they are alternatively payable in other currencies. If one alternative method of payment is proscribed by the statute expressly, the entire obligation is covered even though the

other alternative may not itself be specifically banned. This is the rule which has been applied to situations where an agreement is framed in the alternative and one of the alternatives is subject to the Statute of Frauds. The statute is deemed in such cases to include the entire obligation, so that both alternatives contained in the obligation are considered unenforcible. (De Beerski v. Paige, 36 N. Y. 537.) The same principle should be applied to the analogous situation here under consideration.

The joint resolution, not stopping with the phrase which outlaws provisions in obligations calling for payment in gold, proceeds to make payment of legal tender sufficient for all obligations payable in money of the United States, whether they contain such a provision for gold payment or not. This latter provision, applicable to all such obligations, was not necessary if the joint resolution were only intended by the Congress to cover United States coin or currency, since the separate gold clause provision in the resolution took care of the question of United States coin and currency even if gold payments were promised. It must have been intended by the Congress to cover not only situations where gold had been promised, but also all cases where a promise has been made, like the present one, which would have required payment in some other manner than dollar for [fol. 88] dollar on a parity with other obligations. An alternative currency provision is one of the contingencies at which the joint resolution was aimed.

The resolution was adopted by the Congress as one of a series of legislative and executive acts designed to meet the unprecedented economic and monetary crisis which had come upon the Nation. The general policy followed in these enactments was to devalue the dollar for the purposes of protecting the foreign commerce of the United States from other depreciated currencies, of maintaining the parity of currency issues of the United States, and of reducing the unjust burden of debts which, because of fallen prices, required payment in so many more units of commodities in 1933 than when the debts had been created. That was the policy expressed in the preamble of the joint resolution itself; it had been declared in the so-called Thomas amendment to the Agricultural Adjustment Act (48 U. S. Stat. at Large, 51-53, § 43), which gave the President the right to devalue the dollar. The joint resolution had to be enacted to protect this policy, because so many billions of dollars

of obligations issued in normal times were then outstanding which had contractual requirements inconsistent with this policy, such as payment in gold, or payment in currencies of other nations which had not gone off the gold standard. In the emergency it was clearly necessary to invalidate all provisions which were in conflict with this general policy; and that was the intent of the Congress when it acted.

The purpose of the resolution, as judicially stated by our highest court, was "to establish a uniform currency, and parity between kinds of currency, and to make that cur- [fol. 89] rency, dollar for dollar, legal tender for the payment of debts" (Norman v. Baltimore & O. R. R. Co., supra, p. 316). The court there held ineffectual a contractual provision for payment in gold, on the ground that it frustrated this policy of the Congress which was being carried out pursuant to its constitutional "broad and comprehensive national authority over the subjects of revenue, finance and currency" (p. 303). The statement in the opinion pointing out the "dislocation of the domestic economy" which would be caused by "a disparity of conditions" in which debtors on bonds would earn their income in a depreciated currency but would be obliged to disburse their interest payments in a currency of much higher value, is equally applicable to bonds payable in alternative currencies.

From a reading of the resolution in the light of the economic and financial conditions of the time of its adoption and in the light of the avowed policy of the Congress adopted to meet such conditions, I conclude that these coupons are covered by the resolution. That conclusion is in line with established appellate court precedent in this State.

In City Bank Farmers Trust Co. v. Bethlehem Steel Company (244 App. Div. 634) an American owner of bonds similar to those here in suit was denied payment of the undepreciated amount of currency, after presentation of his coupon in Amsterdam for payment in Dutch guilders. It is true that in the opinion of the court in that case significant mention was made of the fact that the plaintiff there was an American citizen, and not a foreigner as in the case now under consideration. The opinion in the Appellate [fol. 90] Division, however, states (at p. 635): "We believe that the points made by the appellant [the obligor of the bond] are sound and that the judgment should be modified." I have examined the brief of the appellant in that case, and no distinction was made therein between American and

foreign holders. The argument was directed principally to the point that "multiple currency" obligations are within the ban of the joint resolution. Although the opinion mentions the fact that the plaintiff was an American corporation, a reading of the entire opinion shows that that was not the basis of the decision. Nor does the joint resolution make any distinction in its terms between different classes either of obligors or obligees—American or foreign.

Even if the conclusions here reached are not correct, that the alternative payments provided for in these coupons are excused by the resolution, the authority of the case of Anglo-Continentale Treuhand, A. G. v. Southern Pacific Co. (N. Y. L. J. Jan. 2, 1937, at p. 9; aff'd without opinion, 251 App. Div., 803) would prevent a summary judgment for any amount in excess of twenty-five dollars for each coupon. For there is still present here, as there was in that case, "the issue of whether the transfer of the coupons to this plaintiff was bona fide or with intent to evade the effects of the joint resolution as interpreted by the Appellate Division," which can be determined only by trial.

It is not necessary to consider what effect, if any, the joint resolution would have if suit were brought in a foreign country. That question would involve the extra-territorial [fol. 91] effect of the resolution on the contractual rights of citizens of another sovereignty. When the suit is brought in our courts, the will of the Congress should be upheld as to all plaintiffs, citizens or foreigners.

The fact that this defendant formerly announced a policy of paying undepreciated currency to bona fide foreign holders of its bonds, who had not purchased their bonds for the purpose of speculating after the devaluation of the American currency, does not prevent it from insisting now upon its legal rights under the joint resolution. Whether its present change of policy has come from a change in business judgment or from a realization of the fact that many American holders of its bonds have been selling their bonds or coupons to foreigners to evade the provisions of the resolution is immaterial.

Two decisions in the federal courts are directly opposed to the result here arrived at: McAdoo v. Southern Pacific Co. (10 F. Supp. 953; revd. on other grounds, 82 F. [2d] 121); Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern R. Co., (81 id. 11; certiorari denied, 298 U. S., 655). Since their decision, however, a contrary ruling

has been made by the Appellate Division in this Department in affirming without opinion the holding in Anglo-Continentale Treuhand A. G. v. Southern Pacific Co. (supra). The authority of our own appellate courts will in such circumstances take precedence, since the denial of certiorari by the highest court does not determine the merits of the appeal.

As to some of the coupons here sued upon, the defense of res adjudicata is raised. This defense is based upon a prior action between these same parties on coupons from [fol. 92] some of these same bonds, in which the plaintiff was awarded summary judgment against the defendant under a judicial construction of the joint resolution different from the one here adopted. The defendant did not appeal from that judgment.

Since the result of this action will not destroy or impair the substance of the rights or interests established in the first action on the other coupons, the defendant may raise new issues even though they could have been interposed and litigated in the prior action (Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N. Y. 304). New defenses are here presented, such as the issue of good faith in the transfer of the coupons. Besides, the sole question on which the prior case was determined was one of law, and not of fact. The rule of stare decisis would accordingly be more appropriate than res adjudicata. However, in view of what I deem to be contrary holdings of the Appellate Division in this Department, and because I construe the statute differently, I am constrained not to follow the prior decision on the other coupons.

Judgment will be allowed only for the sum of twenty-five dollars per coupon. Settle order.

[fol. 93] In Supreme Court of New York, Appellate Division, First Department

Index No. 24334—1937

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff-Appellant,

against

Bethlehem Steel Company, Defendant-Respondent

Stipulation as to Exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the following papers need not be printed and may be omitted from the printed papers on appeal from the judgment and order in the above entitled action and that copies of each of the same may be handed up to the Court on the argument of the appeal [or of any subsequent appeal herein]* and may be referred to in briefs and arguments with the same force and effect as though formally included in the printed papers on appeal: M. O. O. B.

1. So much of Exhibit A, annexed to the affidavit of A. Sprecher, sworn to on July 29, 1936, in support of motion for summary judgment, as consists of a copy of an exempli-
[fol. 94] fied certificate, in the German language, of protest for nonpayment of coupons presented on behalf of the plaintiff.

2. So much of Exhibit A, annexed to the affidavit of J. Hunsperger, sworn to September 9, 1936, in support of motion for summary judgment, as consists of a copy of an exemplified certificate, in the German language, of protest for non-payment of coupons presented on behalf of the plaintiff.

3. The Mortgage Indenture dated February 16, 1910 from Lackawanna Steel Company to Union Trust Company of New York, securing the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company payable March 1, 1950.

4. The printed papers on appeal in Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem

[* Matter enclosed in brackets, struck out in copy.]

Iron & Steel Corporation, Index No. 12479-1936 handed up to the Court upon the argument of the motion for summary judgment and referred to in the affidavit of Redmond F. Kernan, Jr., sworn to September 23, 1937.

5 Exhibit A, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, in opposition to motion for summary judgment, consisting of a photostatic copy of a specimen form front and back of a thousand dollar Lackawanna Steel Company First Consolidated Mortgage 5% Gold Bond, Series A, of 1950.

6 Exhibit B, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, consisting of a photostatic [fol. 95] copy of the form of front and reverse side of the second page of coupons appurtenant to the form of Bond contained in Exhibit A.

Dated January 4, 1938

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

So Ordered. —— ——, F. M.

[fol. 96] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the Notice of Appeal, Order and Judgment appealed from, and all of the papers used on the motion and now on file in the Office of the Clerk of the County of New York. Certification thereof by the Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, March 16, 1938.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

[fol. 97] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIR:

Please take notice that the plaintiff above named hereby appeals to the Court of Appeals of the State of New York from the judgment in the above entitled action entered in the office of the Clerk of the County of New York on the 19th day of July, 1938, which was entered upon an order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on the 17th day of June, 1938, which order, two justices dissenting, affirmed the judgment of the Supreme Court in the above entitled action entered in the Office of said Clerk of New York County on or about the 16th day of December, 1937.

Please take further notice that the plaintiff appeals from each and every part of said judgment of the said Appellate [fol. 98] Division of the Supreme Court and from the whole thereof.

Dated July 21st, 1938.

Yours, etc., Miller, Owen, Otis & Bailly, Attorneys for Plaintiff, No. 15 Broad Street, New York, N. Y.

To Archibald R. Watson, Esq., The Clerk of the County of New York. Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, 15 Broad Street, New York, N. Y.

IN SUPREME COURT OF NEW YORK

JUDGMENT APPEALED FROM

Plaintiff having appealed to the Appellate Division of the Supreme Court for the First Judicial Department from the judgment entered herein in the office of the Clerk of the County of New York on the 16th day of December, 1937, adjudging that the plaintiff have judgment against defendant Bethlehem Steel Company, a Pennsylvania corporation,

in the sum of $36,375, and that the plaintiff's complaint be dismissed as against said defendant in respect to the plaintiff's claim of its right to receive payment of 129.50 Swiss [fol. 99] francs for each coupon subject of this action and in respect to its claim for damages in dollars in excess of $25 for each of said coupons; and from the order entered the 9th day of December, 1937, upon which said judgment is based (except from so much of said order as directs the severance of the action as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company) and said Appellate Division having made an order and judgment dated June 17, 1938, affirming said judgment, and said order so far as appealed from, with costs on appeal to the respondent (two of the justices dissenting in part) and the remittitur of said Appellate Division having been filed in the office of the Clerk of the County of New York on the 21st day of June, 1938, it is

Adjudged that said judgment entered herein on the 16th day of December, 1937, and said order entered herein on the 9th day of December, 1937 so far as appealed from, be, and are hereby, in all respects affirmed with costs on appeal to said defendant Bethlehem Steel Company, and it is

Further adjudged that defendant Bethlehem Steel Company, a Pennsylvania corporation, of 25 Broadway, New York City, recover of Zurich General Accident & Liability Insurance Company, Ltd., of Zurich, Switzerland, plaintiff, the sum of $164.45, costs on said appeal as taxed, and that said defendant have execution therefor.

Judgment entered this 19th day of July, 1938.

Archibald R. Watson, Clerk.
(Seal.)

[fol. 100] In Supreme Court of New York, Appellate Division

Order of Affirmance on Appeal from Judgment—June 17, 1938

Present: Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Irwin Untermyer, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

[Same Title]

An appeal having been taken to this Court by the plaintiff from an order of the Supreme Court, New York County,

entered on the 9th day of December, 1937, granting plaintiff's motion for summary judgment against the defendant, except so much of said order as directs that this action be severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company, and from the judgment entered thereon on the 16th day of December, 1937.

And said appeal having been argued by Mr. Nathan L. Miller of counsel for the appellant, and by Mr. William D. Whitney of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the order, so far as appealed from, and the judgment, be and the same are hereby affirmed; and that the respondent recover of the appellant the costs of this appeal. Two of the Justices dissenting in part.

Enter.

J. O'M.

[fol. 101] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

MEMORANDUM DECISION

Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Steel Company. Order so far as appealed from, and the judgment entered thereon, affirmed with costs. No opinion.

(Untermyer and Callahan, JJ., dissenting in part.)

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

DISSENTING OPINION OF UNTERMYER, J.

UNTERMYER, J. (dissenting in part):

I dissent in part and vote to reverse the order and judgment appealed from in so far as they limit the plaintiff's recovery, and grant judgment for the relief demanded in the complaint, for the reasons stated by Judge Hand in the opinion of the Circuit Court of Appeals, Second Circuit, in Anglo-Continentale Treuhand A. G. *v.* St. Louis Southwestern Ry. Co., 81 F. (2d) 11 (certiorari denied Henwood, Trustee, *v.* Anglo-Continentale Treuhand A. G.,

298 U. S. 655). In addition, in our opinion, the prior judgments are res adjudicata as to those coupons now sued on which were detached from the forty bonds involved in the prior suits.

Callahan, J., concurs.

[fol. 102] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

Redmond F. Kernan, Jr., being duly sworn, deposes and says: I am an attorney-at-law associated with Miller, Owen, Otis & Bailly, attorneys for the plaintiff-appellant herein, and I am familiar with the proceedings had upon the appeal to the Appellate Division in this action. No opinion was rendered by the majority of the Appellate Division in affirming the judgment herein other than the above memorandum decision. The dissenting opinion was written by Untermyer, J. and concurred in by Callahan, J.

Redmond F. Kernan, Jr.

Sworn to before me this 23rd day of July, 1938. Anthony J. Musacchio, Notary Public. Kings Co. Clk's No. 19, Reg. No. 119. N. Y. Co. Clk's No. 86, Reg. No. 0 M 86. Queens Co. Clk's No. 132, Reg. No. 1006. Commission Expires March 30, 1940. (Seal.)

[fol. 103] IN COURT OF APPEALS OF NEW YORK

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff-Appellant,

against

BETHLEHEM STEEL COMPANY, Defendant-Respondent.

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the following papers need not be printed and may be omitted from the record on appeal from the judgment in the above entitled action and that copies of each of the same may be

handed up to the Court on the argument of the appeal and may be referred to in briefs and arguments with the same force and effect as though formally included in the record on appeal:

1. So much of Exhibit A, annexed to the affidavit of A. Sprecher, sworn to on July 29, 1936, in support of motion for summary judgment, as consists of a copy of an exemplified certificate, in the German language, of protest for non-payment of coupons presented on behalf of the plaintiff.

2. So much of Exhibit A, annexed to the affidavit of J. Hunsperger, sworn to September 9, 1936, in support of motion for summary judgment, as consists of a copy of an [fol. 104] exemplified certificate, in the German language, of protest for non-payment of coupons presented on behalf of the plaintiff.

3. The Mortgage Indenture dated February 16, 1910 from Lackawanna Steel Company to Union Trust Company of New York, securing the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company payable March 1, 1950.

4. The printed papers on appeal in Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Iron & Steel Corporation, Index No. 12479-1936 handed up to the Court upon the argument of the motion for summary judgment and referred to in the affidavit of Redmond F. Kernan, Jr., sworn to September 23, 1937.

5. Exhibit A, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, in opposition to motion for summary judgment, consisting of a photostatic copy of a specimen form front and back of a thousand dollar Lackawanna Steel Company First Consolidated Mortgage 5% Gold Bond, Series A, of 1950.

6. Exhibit B, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, consisting of a photostatic copy of the form of front and reverse side of the second page of coupons appurtenant to the form of Bond contained in Exhibit A.

Dated, July 23, 1938.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

[fol. 105] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the Notice of Appeal to the Court of Appeals, the Judgment of the Appellate Division appealed from, the Order of Affirmance, the Memorandum Decision, the Dissenting Opinion, and all the papers upon which the Court below acted in making the Order and the Judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by the said Clerk is hereby waived.

Dated July 23, 1938.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

[fol. 106] IN COURT OF APPEALS OF NEW YORK

No. 430-A

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Appellant,

against

BETHLEHEM STEEL COMPANY, Respondent.

OPINION

O'BRIEN, J.:

March 1, 1910 Lackawanna Steel Company, predecessor of defendant Bethlehem Steel Company issued a series of gold bonds payable March 1, 1950 in United States Gold in the sum of $1,000 and also in pound sterling at £205.15.2, guilders at 2480, marks at 4200 and francs. If paid in francs in France, Belgium or Switzerland, the corporation promised to pay 5,180 francs and interest in the respective currencies. Each coupon contained a promise that, if paid in France, Belgium or Switzerland, the corporation would pay 129.50 francs for each six months interest, and that they were payable not only at New York, but at London, Frank-

fort, Amsterdam, at Basel and Zurich at Schweizerische Kreditanstalt.

Plaintiff, a Swiss corporation having its principal place of business in Switzerland, purchased 323 of these bonds. On July 16, 1936 it presented 1,132 coupons at Schweizerische Kreditanstalt at Zurich and demanded payment at [fol. 107] the rate of 129.50 Swiss francs or an aggregate of 146,594 Swiss francs and on September 7, 1936 it presented at the same place 323 coupons for payment at the same rate or an aggregate of 41,828.50 Swiss francs. On both occasions payment in these amounts of Swiss francs was refused. The allegations in the complaint are that on July 15, 1936 the market value of 146,594 Swiss francs in Zurich was $48,009.54 in lawful money of the United States and that on September 7, 1936 the value of 41,828.50 francs was $13,631.90. The relief demanded in the complaint is judgment for $61,766.04 with interest. Judgment has been rendered in favor of plaintiff only for the sum of $36,375 and its complaint was dismissed in respect to its claim of right to receive 129.50 Swiss francs for each coupon. Such judgment resulted upon the theory that plaintiff is not entitled to receive more than the value in United States currency of present legal tender reduced by reason of the Joint Resolution of Congress June 5, 1933.

The question is whether, on the facts of this case, the Joint Resolution is applicable to this obligation to pay foreign currency to a foreign corporation in a foreign country. The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit in Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Ry. Co., 81 Fed. (2nd) 11 (1936) wherein the facts were the same at bar except that payment was made in guilders at Amsterdam instead of francs at Zurich. That court decided that damages recoverable in dollars were required to be calculated at gold par of the guilder and not [fol. 108] at the rate of exchange prevailing in New York at the time of the judgment.

On the facts of this case, the obligation was not payable in "money of the United States" but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.

The judgment of the Appellate Division and that of the Trial Term should be reversed and plaintiff's motion for summary judgment granted with costs in all courts.

[fol. 109] IN COURT OF APPEALS OF NEW YORK

No. 430-A

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Appellant,

against

BETHLEHEM STEEL COMPANY, Respondent.

MEMORANDUM

FINCH, J. (Dissenting):

To restrict the phrase "obligation payable in money of the United States" so as to exclude a bond, if in addition, for convenience of foreign bondholders, it also provides for payment in what was meant to be an equivalent amount in Swiss francs, guilders or other foreign currency, would seem to be unduly narrowing a resolution which by its language indicated that it was of the broadest scope. A reading of the joint resolution shows it to be a resolution not only broad in scope, but one referring to an obligation as a whole rather than to any particular provisions contained therein (Norman v. B. & O., 294 U. S. 240; Perry v. U. S., 303 U. S. 330).

Furthermore, a detailed analysis of the language used would seem to show that the ordinary meaning of the language would reach and apply to every obligation issued before or after the 5th of June, 1933, capable of being paid in the United States. Every such obligation shall be dis-[fol. 110] charged upon payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts. While the first sentence of the resolution considers the obligation as a whole, and strikes down the gold clause, the next sentence provides in the most sweeping language for every obligation which is capable of being paid or may be paid in money of the United States. This language of the joint resolution does not exclude a bond payable in money of the United States because such a bond also contains a provision as a matter of convenience for the payment of the same amounts in foreign

currencies. An obligation which is payable in money of the United States is no whit less such an obligation because it also gives the obligee the right to receive the equivalent of this money in foreign currency.

The obligations in suit are certainly capable of being paid in money of the United States, which brings them within the terms of the Joint Resolution. As such they are dischargeable, dollar for dollar in legal tender.

When we consider that the Joint Resolution precludes a Court of the United States from enforcing a gold clause provision, we are forced to the conclusion that such Courts may not enforce similar provisions of coupons having the same effect.

The intent of Congress being manifest, to strike down gold clause provisions and any other obstructions to its currency policy, it would seem to follow that all similar provisions contained in the principal obligation should be likewise invalid, to the end that a uniform parity should exist as to all obligations which are capable of being paid in dollars.

The judgment appealed from should be affirmed, with costs.

[fol. 111] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of January in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said Court.

Witness: The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

Zurich General Accident & Liability Insurance Company, Ltd., Appellant,

against

Bethlehem Steel Company, Respondent.

Remittitur—January 12, 1939

Be is remembered, That on the 26th day of July in the year of our Lord one thousand nine hundred and thirty-

eight, Zurich General Accident & Liability Insurance Company, Ltd., the Appellant, in this cause, came here unto the Court of Appeals, by Miller, Owen, Otis & Bailly, its attorneys, and filed in the said Court a Notice of Appeal and [fol. 112] return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Bethlehem Steel Company, the Respondent in said cause, afterwards appeared in said Court of Appeals by Cravath, de Gersdorff, Swaine & Wood, its attorneys.

Which Said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Nathan L. Miller, of counsel for the appellant, and by Mr. Frederick H. Wood, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are reversed and plaintiff's motion for summary judgment granted with costs in all courts.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be reversed and plaintiff's motion for summary judgment granted with costs in all courts, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to [fol. 113] be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals

Clerk's Office, Albany, January 12, 1939

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court

of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal of State of New York, Court of Appeals.)

[fol. 114] In Supreme Court of New York, County of New York

Present: Honorable Aaron J. Levy, Justice.

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff;

against

Bethlehem Steel Company, Defendant

Order on Remittitur—January 13, 1939

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Department, in the office of the Clerk of the County of New York on the 19th day of July, 1938, affirming the judgment in favor of the defendant and against the plaintiff heretofore entered herein in the office of the said Clerk on the 16th day of December, 1937, granting judgment in favor of the plaintiff and against the defendant only in the sum of $36,375 and dismissing the complaint in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon subject of this action and in respect [fol. 115] to its claim for damages in dollars in excess of $25 for each of said coupons, and from each and every part of said judgment of affirmance and order of affirmance as well as the whole thereof; and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the judgment so appealed from as aforesaid and that of the Trial Term be reversed and plaintiff's motion for summary judgment granted with costs in all Courts, and having ordered and adjudged that the proceedings herein be remitted to this Supreme Court, there to be proceeded upon according to law;

Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Miller, Owen, Otis & Bailly, attorneys for the plaintiff herein, it is hereby

Ordered, that the said order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

A. J. L., J. S. C.

[fol. 116] In Supreme Court of New York, New York County

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff,

against

Bethlehem Steel Company, Defendant

Judgment

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Department, in the office of the Clerk of the County of New York on the 19th day of July, 1938 affirming the judgment in favor of the defendant and against the plaintiff heretofore entered herein in the office of the said Clerk on the 16th day of December, 1937, granting judgment in favor of the plaintiff and against the defendant only in the sum of $36,375 and dismissing the complaint in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon subject of this action and in respect to its claim for damages in dollars in excess of $25 for each of said coupons, and from each and every part of said judgment of affirmance and order of affirmance as well as the whole thereof; and the said appeal having been duly argued at [fol. 117] the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be reversed and plaintiff's motion for summary judgment granted with costs in all courts; and having ordered and adjudged that the proceedings herein be remitted to this Supreme Court there to be proceeded upon according to

law; and the remittitur from the said Court of Appeals having been filed herein, and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now, on motion of Miller, Owen, Otis & Bailly, attorneys for the plaintiff herein, it is hereby

Ordered and adjudged that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and adjudged that the said judgments entered herein on the 19th day of July, 1938 and the 16th day of December, 1937 be and the same hereby are reversed; and it is further

Ordered and adjudged that the plaintiff's motion for summary judgment is granted with costs in all courts; and it is further

Ordered and adjudged that the plaintiff Zurich General Accident & Liability Insurance Company, Ltd., of Zurich, Switzerland, have judgment against the defendant Beth-
[fol. 118] lehem Steel Company, a Pennsylvania corporation having an office at 25 Broadway, City and State of New York, in the sum of $61,766.04 together with the sum of $7,035.61, being interest on $48,134.14 from July 15, 1936, and together with the sum of $1,942.55, being interest on $13,631.90 from September 7, 1936, and together with the sum of $722.13, costs as taxed, making an aggregate sum of $71,466.33, and that the plaintiff have execution therefor.

Judgment signed and entered this 13th day of January, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 119] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 120] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 16, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted and the case is assigned for argument immediately following No. 495.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 43,075. New York Supreme Court. Term No. 590. Bethlehem Steel Company, petitioner, vs. Zurich General Accident & Liability Insurance Company, Limited. Petition for a writ of certiorari and exhibit thereto. Filed January 13, 1939. Term No. 590, O. T., 1938.

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 11 1929
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 590

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND CONSENT THERETO BY RESPONDENT

FREDERICK H. WOOD,
WM. D. WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

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Appendix 10

Supreme Court of the United States

OCTOBER TERM, 1938

No.

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bethlehem Steel Company respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of New York, County of New York, entered in the above-entitled case on January 13, 1939, upon the remittitur of the Court of Appeals of the State of New York reversing a judgment of the Appellate Division of the Supreme Court of the State of New York, which affirmed a judgment at Special Term of said Supreme Court of the State of New York.

The opinion of the Court of Appeals, and the dissenting opinion of Judge Finch (in which Judge Hubbs concurred), were rendered January 11, 1939, and are unreported (R. 106). The Appellate Division wrote no opinion; but the dissenting opinion in the Appellate Division is reported in R. 101. The opinion of Mr. Justice Rosenman at Special Term is reported in 164 Misc. 498, 299 N. Y. Supp. 862, and at R. 84-92.

SUMMARY STATEMENT

This case involves the question presented in No. 384 in this Court, *Guaranty Trust Company of New York* v. *Berryman Henwood, viz.:*

> Does Public Resolution No. 10 of the 73rd Congress (48 Stat. at L. 112) apply to coupons detached from corporate bonds expressed to be alternatively payable in a fixed number of dollars in gold coin of the United States of America at New York and a fixed number of units of a foreign currency at a foreign city, so that a respondent who has demanded payment in the foreign currency is limited in recovery to the number of dollars denominated in the bond, notwithstanding the fact that the value in dollars of the number of units of the foreign currency denominated in the bond exceeds that number of dollars?

In the present case, Mr. Justice Rosenman answered the question in the affirmative at Special Term (R. 84-92). The Appellate Division of the First Department affirmed, with two Justices dissenting (R. 101). The Court of Appeals reversed, with two Judges dissenting (R. 106).

STATEMENT

The bonds of Lackawanna Steel Company, from which the coupons involved in this case were detached, and the obligations of which were assumed by the petitioner, carried coupons in the following form (with appropriate insertions in the blank spaces) (R. 19):

$25.

On the first day of , 19 , unless the bond hereinafter mentioned shall have been duly called for previous redemption, LACKAWANNA STEEL COMPANY will pay to the bearer at its office or agency in the City of New York, U. S. A., TWENTY-FIVE DOLLARS, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M. Germany, M 105, or in Amsterdam, Holland, Gl. 62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond, Series A, No.	$25 U. S. Gold £5.2.10½ Stg. Marks 105, Guilders, 62 Francs 129.50

J. F. HIGGINSON, Treasurer.

[REVERSE SIDE]

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M, at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

After June 5, 1933, the date of the approval of Public Resolution No. 10, the respondent, a Swiss corporation, presented coupons (which by their terms were payable

after June 5, 1933) for payment in Switzerland and demanded payment in Swiss francs. The petitioner refused to meet the demand; whereupon the respondent brought action in the Supreme Court of the State of New York to recover the dollar value of the Swiss francs which it claimed should have been paid when these coupons were presented for payment, and moved for a summary judgment.

Mr. Justice Rosenman wrote an extensive opinion setting forth the reasons on which he denied such summary judgment (R. 84-92); and his conclusion was affirmed by the Appellate Division (R. 101) (per Justices O'Malley, Townley and Cohn, with Justices Untermyer and Callahan dissenting); but was reversed by the Court of Appeals (R. 106) (Judges Finch and Hubbs dissenting). Summary judgment has accordingly been entered against the petitioner.

Reasons Relied on for the Allowance of the Writ

I

A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The question of application of Public Resolution No. 10 to corporate bonds of precisely this character has been in litigation in numerous courts, and has given rise to a remarkable diversity of opinion, but has not yet been the subject of any action in this Court other than the denial of a petition for writ of certiorari in *Henwood* v. *Anglo-*

Continentale Treuhand A. G., 298 U. S. 655, and the grant of a petition for a writ of certiorari in *Guaranty Trust Company of New York* v. *Henwood*, Oct. T. 1938 No. 384. Before its decision by the Court of Appeals of the State of New York, the precise question had been before three United States Circuit Courts of Appeals. The 9th Circuit Court of Appeals avoided a determination of the main question by reversing the decision of Judge Lindley, 10 Fed. Supp. 953, (which had been favorable to the respondent's view here), upon a procedural ground, *Southern Pacific Co.* v. *McAdoo*, 82 F. (2d) 121. The 2nd Circuit Court of Appeals decided in favor of the respondent's position in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11; and the 8th Circuit Court of Appeals expressly disagreed with it, *Guaranty Trust Company of New York* v. *Henwood*, 98 F. (2d) 160.

The question had been before the Appellate Division of the First Department of the State of New York four times. That Court in each case sustained the petitioner's position,—one Justice (of a court of four) dissenting in the first case, and two Justices (of a court of five) dissenting in the last two cases. *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634; *Anglo-Continentale Treuhand, A. G.* v. *Southern Pacific Co.*, 251 App. Div. 803; *Zurich General Accident & Liability Insurance Company, Limited* v. *Lackawanna Steel Co.* (this case), 254 App. Div. 839; and *Anglo-Continentale Treuhand, A. G.* v. *Bethlehem Steel Co.*, 254 App. Div. 844. The Court of Appeals has now reversed the Appellate Division, with two Judges (of a court of seven) dissenting.

We submit that it is rare for a case to reach this Court in which there has been a greater diversity of judicial opinion. The question appears to merit not merely actual decision by this Court (which might in any event be obtained in No. 384), but an opportunity to the parties in the New York State Court litigation to be heard in the presentation of the case to this Court. In other words, whether or not another case which may involve the same question be already here, it would seem that the discretion of this Court should be moved to permit argument before it by the parties which have litigated an important federal question before two state appellate courts that have expressly disagreed, and in each court with two dissenting judges.

In addition, petitioner's counsel (by leave of Court) filed a brief and took part in the oral argument before the 8th Circuit Court of Appeals. See 98 F. (2d) 160, 161.

Finally, it is possible that the decision in No. 384 may go off on a ground different from that on which a decision in this case would be based. See the brief of the respondent in that case in opposition to the petition for writ of certiorari therein. In that event, it would be necessary to grant a review of the cases in the State court, if the federal question is to be decided.

II

A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The adverse opinion of the Court of Appeals of the State of New York is based on an expressed agreement

with the opinion of the 2nd Circuit Court of Appeals in *Anglo-Continentale Treuhand, A. G.*, v. *St. Louis Southwestern Railway Co.*, 81 F. (2d) 11. The same is true of the dissenting opinion in the intermediate appellate court in New York State (R. 101). Neither opinion gave adequate, or indeed any, consideration to the *language* of the opinions of this Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and related cases, and in *Holyoke Water Power Company* v. *American Writing Paper Company*, 300 U. S. 324. The decisions in those cases (we submit) determined that cases of the character of this case,—*viz.*, cases involving particular applications of Public Resolution No. 10,—should be determined with a view to effectuating the intent of the Congress as therein set forth.

Indeed, neither in the opinion of the 2nd Circuit Court of Appeals, nor in the opinions of the judges of the courts of the State of New York which have accepted it, do we find any real consideration either of the language of Public Resolution No. 10 or of its spirit.

But in the able and comprehensive opinion of Mr. Justice Rosenman at Special Term in the present case, 164 Misc. 498, 299 N. Y. Supp. 862, R. 84-92, we find a convincing discussion of the language of Public Resolution No. 10, upholding its plain applicability to the state of facts presented in this case. And in the equally able and comprehensive opinion of Judge Stone for the 8th Circuit Court of Appeals in *Guaranty Trust Company* v. *Henwood*, 98 F. (2d) 160, we find a full discussion of the spirit of the Resolution as expressive of the intent of Congress, as interpreted in the light of the opinions of this Court above referred to: *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and *Holyoke Water Power Company* v. *American Writing Paper Co.*, 300 U. S. 324.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, New York County, commanding said court to certify and send to this Court, on a day to be designated, a transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the court below be reversed; and that the petitioner be granted such other and further relief as may be just and proper.

Dated, New York, N. Y., January 13, 1939.

FREDERICK H. WOOD,
WM. D. WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1938

No.

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

CONSENT

Now comes Zurich General Accident & Liability Insurance Company, Limited, and consents to the grant of the petition for Writ of Certiorari herein, but without accepting or adhering to any of the arguments set out in the body of the foregoing petition.

NATHAN L. MILLER,
Counsel for Zurich General Accident & Liability Insurance Company, Limited,
15 Broad Street,
New York, N. Y.

APPENDIX

Public Resolution No. 10

73rd Congress

48 Stat. at L. 112

JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee

a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.40 p.m.

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Supreme Court, U. S.
FILED
FEB 1 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938

No. 590

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

No. 591

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A.G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A.G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A.G., a Liechtenstein corporation,
Respondents.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

PETITIONER'S BRIEF

FREDERICK H. WOOD,
WM. D. WHITNEY,
Counsel for Petitioner.

HOYT A. MOORE,
HAROLD F. MCGUIRE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1938.

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.
No. 590

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ANGLO-CONTINENTALE TREUHAND, A.G., *et al.*,
Respondents.
No. 591

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

PETITIONER'S BRIEF

These two cases involve the same issue. Accordingly, in the interest of convenience, only one brief is being filed. The facts in each case are hereinafter stated separately. For the purpose of distinguishing between references to the respective records, references to the record in No. 590 will be preceded by "R.", and to that in No. 591 by "Tr."

Opinions Below

No. 590

The opinion of the Court of Appeals of the State of New York (R. 70), and the dissenting opinion therein (R. 72), are unreported. The Appellate Division, First Department, wrote no opinion. The dissenting opinion therein (R. 67) is reported in 254 App. Div. 839, 840. The opinion of the Supreme Court, New York County (R. 57), is reported in 164 Misc. 498, 299 N. Y. Supp. 862.

No. 591

The *per curiam* opinion of said Court of Appeals (Tr. 109), following the opinion of the same court on the same day in No. 590, is unreported. The Appellate Division, First Department, wrote no opinion. The opinion of the Supreme Court, New York County (Tr. 86), is not reported.

Jurisdiction

No. 590

The judgment of the Supreme Court, New York County (R. 76), was entered January 13, 1939, upon the remittitur of the Court of Appeals (R. 73) filed January 12, 1939. The petition for a writ of certiorari was filed January 13, 1939, and was granted January 16, 1939 (R. 77).

The jurisdiction of this Court rests upon the provisions of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. at L. 937 (28 U. S. C. § 344).

No. 591

The judgment of the Supreme Court, New York County (Tr. 114), was entered January 12, 1939, upon the remittitur of the Court of Appeals (Tr. 109) filed January 12, 1939. The petition for a writ of certiorari was filed January 13, 1939, and was granted January 16, 1939 (Tr. 116).

The jurisdiction of this Court rests upon the provisions of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. at L. 937 (28 U. S. C. § 344).

Statement in No. 590

Respondent brought suit in the Supreme Court of the State of New York, New York County, to recover a judgment for $61,766.04 (R. 12) upon interest coupons (payment of which and the bonds from which detached[1] has been assumed by the petitioner) in the aggregate face amount, in dollars, of $36,375. The coupons are in the following form (with appropriate insertions in the blank spaces) (R. 12):

[1]The bonds were issued prior to June 5, 1933 (R. 7, 16).

$25.

On the first day of , 19 , unless the bond hereinafter mentioned shall have been duly called for previous redemption, LACKAWANNA STEEL COMPANY will pay to the bearer at its office or agency in the City of New York, U. S. A., TWENTY-FIVE DOLLARS, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M. Germany, M 105, or in Amsterdam, Holland, Gl. 62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond, Series A, No. .....

$25 U. S. Gold
£5.2.10½ Stg. Marks 105,
Guilders, 62
Francs 129.50

J. F. HIGGINSON, Treasurer.

[REVERSE SIDE]

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M, at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

The amounts in pounds, marks, guilders and francs were calculated on the basis of gold par exchange at the time of issue.

After June 5, 1933, respondent presented its coupons (which were payable after said date) in Zurich, Switzerland, and demanded payment of 129.50 Swiss francs on each coupon, which payment was refused by petitioner (R. 32). The present suit was brought to recover the dollar value of the Swiss francs demanded. The difference of $25,391.04 between the judgment demanded in the complaint and the face dollar amounts of the coupons represents the premium on Swiss francs, in terms of dollars, resulting from the devaluation of the dollar.

Petitioner by its answer set up as a defense (R. 17) Public Resolution No. 10 of the 73d Congress, approved June 5, 1933, 48 Stat. at L. 112 (hereinafter referred to as the Joint Resolution or the Resolution), contending that under the Joint Resolution respondent's recovery on its coupons must be limited to the aggregate dollar amount specified therein. Petitioner also alleged that respondent (which is a Swiss corporation—R. 7) acquired the bonds and coupons referred to from residents of the United States, with full notice and knowledge of the Joint Resolution, and with intent to evade the application thereof (R. 17, 52).

Respondent then moved for summary judgment, which was granted only in part, *i.e.*, for the dollar face amount of the coupons (R. 5), Mr. Justice Rosenman in an elaborate opinion (164 Misc. 498, 299 N. Y. Supp. 862; R. 57) sustaining petitioner's contention that the Joint Resolution applied to the coupons in suit.

This order and judgment were affirmed by the Appellate Division (R. 66), two of five Judges dissenting; but were reversed by the Court of Appeals (R. 73), Judges Finch and Hubbs dissenting. The majority opinion of the Court of Appeals (R. 70) held the Joint Resolution inapplicable to the coupons in suit, this being the only question decided.[2] Summary judgment has accordingly been entered for $61,766.04, plus interest and costs (R. 76).

---

[2]As an independent basis for its asserted right to recovery, respondent contended that the question of the applicability of the Joint Resolution was *res judicata* by reason of a prior decision at Special Term (from which no appeal was prosecuted) involving coupons appurtenant to certain of the bonds to which certain (but not all) of the coupons involved in the present suit were also appurtenant (R. 48). The Court of Appeals did not pass on this question, however.

Statement in No. 591

Respondents brought suit in the Supreme Court of New York County to recover judgment upon multiple currency coupons detached from bonds issued by petitioner prior to June 5, 1933 (Tr. 7). The coupons are in the following form (with appropriate insertions in the blank spaces) (Tr. 30):

On the first day of , 19 ,	$25.00
unless the Bond, hereinafter mentioned,	£5.2.10
shall have been called for previous re-	62.25 Guilders
demption	

BETHLEHEM STEEL COMPANY

will pay to bearer at its office, or agency, in the City of New York, U. S. A., Twenty-Five Dollars, United States Gold Coin, or in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bond.

$25.00 Series A No.

(signed)—B. H. JONES, Treasurer No.

As in No. 590, the amounts in pounds and guilders were calculated on the basis of gold par exchange at the time of issue.

After June 5, 1933, respondents, which are corporations of The Netherlands and of Liechtenstein (Tr. 7, 13, 18, 24), presented their respective coupons (which were payable after said date) for payment in Amsterdam and demanded payment in Dutch guilders (Tr. 45, 47, 48, 49). The petitioner refused to meet the demand; whereupon respondents brought the present suit to recover the dollar value of the Dutch guilders which they claimed should have been paid when the coupons were presented for payment (Tr. 8, 26).

The petitioner by its answer set up defenses substantially identical to those above referred to in the statement in No. 590 (Tr. 37-39); and respondents moved for summary judgment (Tr. 6). Mr. Justice Hofstadter granted such motion, with a brief memorandum (Tr. 86), in which he held the Joint Resolution inapplicable to the coupons in suit.

The Appellate Division modified the judgment below (Tr. 102), two of the five Judges dissenting; but was in turn reversed by the Court of Appeals which affirmed the judgment of the Supreme Court (Tr. 109), Judges Finch and Hubbs dissenting, in a *per curiam* opinion (Tr. 109) following the opinion of the same court on the same day in No. 590.[3] Judgment has accordingly been entered in the respondents' favor (Tr. 114).

---

[3] As an independent basis for their asserted right to recovery, certain of the respondents contended in the Court of Appeals that the question of the applicability of the Joint Resolution was *res judicata* by reason of a prior decision involving different coupons from different bonds issued under a different indenture and by a different company, but this question was not raised at Special Term, nor was it passed on by the Court of Appeals.

The Statute Involved

Public Resolution, No. 10, 73d Congress, Approved June 5, 1933 (c. 48, 48 Stat. 112).

JOINT RESOLUTION

To Assure Uniform Value to the Coins and Currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every

obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Sec. 2. The last sentence of paragraph (1) of subsection (b) of Section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes", approved May 12, 1933, is amended to read as follows:

> "All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues, ex-

cept that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

The Question Presented

Does the Joint Resolution apply to coupons detached from corporate bonds expressed to be alternatively payable in a fixed number of dollars in gold coin of the United States of America at New York and a fixed number of units of a foreign currency at a foreign city, so that a respondent who has demanded payment in the foreign currency is limited in recovery to the number of dollars denominated in the bond, notwithstanding the fact that the value in dollars of the number of units of the foreign currency denominated in the bond exceeds that number of dollars?

In determining this question, two undisputed facts are, in our view, of critical importance:

First, this Court relied, in upholding the constitutionality of the Joint Resolution as applied to private obligations, upon estimates made at its bar[4] to the effect that its decision would affect approximately $75,000,000,000 of corporate bonds containing "gold clauses", that is to say, would result in their being discharged in legal tender currency in the amount of dollars expressed on the face of the bonds. The alternative foreign currency bonds (involved in these and other like cases) are themselves part and parcel of that $75,000,000,000, *since they too contain "gold clauses".*

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[4] *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 313.

Second, an ultimate decision in favor of the respondents will provide a method whereby the effect of the Resolution can be *destroyed* in respect of all future obligations. Future obligations may then be so drawn as to hedge against further devaluation of the dollar by incorporating provisions for alternative payment in all foreign currencies which may be expected to enjoy or obtain a premium over the dollar, of like character to the premiums here involved.

Prior Litigation of the Question Presented

Before its decision by the Court of Appeals of the State of New York, this precise question had been before three United States Circuit Courts of Appeals. The 9th Circuit Court of Appeals avoided a determination of the main question by reversing the decision of Judge Lindley, 10 Fed. Supp. 953, (which had been favorable to the respondent's view here), upon a procedural ground, *Southern Pacific Co.* v. *McAdoo,* 82 F. (2d) 121. The 2nd Circuit Court of Appeals decided in favor of the respondent's position in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company,* 81 F. (2d) 11; and the 8th Circuit Court of Appeals expressly disagreed with it, *Guaranty Trust Company of New York* v. *Henwood,* 98 F. (2d) 160, certiorari granted, No. 384, October Term, 1938.

The question had been before the Appellate Division of the First Department of the State of New York four times. That Court in each case sustained the petitioner's position,—one Justice (of a court of four) dissenting in the first case, and two Justices (of a court of five) dissenting in the last two cases. *City Bank Farmers Trust Co.*

v. *Bethlehem Steel Co.*, 244 App. Div. 634; *Anglo-Continentale Treuhand, A. G.* v. *Southern Pacific Co.*, 251 App. Div. 803; *Zurich General Accident & Liability Insurance Company, Limited* v. *Lackawanna Steel Co.* (No. 590 herein), 254 App. Div. 839; and *Anglo-Continentale Treuhand, A. G.* v. *Bethlehem Steel Co.* (No. 591 herein), 254 App. Div. 844. The Court of Appeals in the cases now here has now reversed the Appellate Division, with two Judges (of a court of seven) dissenting.

The adverse opinion of the Court of Appeals (R. 70) is based on an expressed agreement with the opinion of the 2nd Circuit Court of Appeals in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.*, 81 F. (2d) 11. The same is true of the dissenting opinion in the intermediate appellate court in New York State (R. 67). But neither in the opinion of the 2nd Circuit Court of Appeals, nor in the opinions of the judges of the courts of the State of New York which have accepted it, do we find any real consideration either of the language of Public Resolution No. 10 or of its spirit, or of the decisions of this Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and *Holyoke Water Power Company* v. *American Writing Paper Co.*, 300 U. S. 324.

On the other hand, in the able and comprehensive opinion of Mr. Justice Rosenman at Special Term in No. 590 (164 Misc. 498, 299 N. Y. Supp. 862, R. 84-92) we find a convincing discussion of the language of Public Resolution No. 10, upholding its plain applicability to multiple currency obligations. And in the equally able and comprehensive opinion of Judge Stone for the 8th Circuit Court of Appeals in *Guaranty Trust Company* v. *Henwood*, 98 F. (2d) 160 (No. 384 below), we find a full discussion of the

spirit of the Resolution as expressive of the intent of Congress, as interpreted in the light of the opinions of this Court above referred to.

Specification of Errors to Be Urged

The Court of Appeals of the State of New York erred:

1. In holding that Public Resolution No. 10 of the Seventy-third Congress, approved June 5, 1933 (c. 48, 48 Stat. 112), referred to herein as the Joint Resolution or the Resolution, is inapplicable to the coupons in suit, and in not holding to the contrary.

2. In holding that the Joint Resolution did not direct the discharge of the coupons in suit upon payment of the amount in dollars specified therein, and did not preclude recovery thereon of a premium represented by the difference between the value at the applicable exchange rate in dollars of the number of Swiss francs (in No. 590) and Dutch guilders (in No. 591) specified therein and the number of dollars specified therein, and in not holding to the contrary.

3. In reversing the judgments of the Appellate Division of the First Department and directing the entry of judgments for respondents in the amount of the value in dollars at the applicable exchange rates of the number of Swiss francs (in No. 590) and Dutch guilders (in No. 591) specified in the coupons in suit.

Summary of Argument

I.

The Language of the Resolution.

By the express terms of the Joint Resolution, all "obligations payable in money of the United States" are dischargeable upon payment in legal tender of the dollar amount stated therein. The coupons in suit are payable in so many dollars in gold coin, or alternatively, at the option of the holder, in so many Dutch guilders or Swiss francs. As such, each coupon constitutes one "obligation", with two alternative payment "provisions". The Resolution carefully distinguishes between an "obligation", *i.e.*, a bond, coupon or other agreement or contract (payable in money of the United States), and mere "provisions" for payment contained therein. It then provides that "every obligation" shall be discharged in legal tender dollars, "whether or not" containing a gold clause or other particular "provision". "Obligations" such as the coupons in suit, which contain gold clause "provisions", are, therefore, squarely within its terms.

Our construction is the only one which gives effect to every word in the Joint Resolution and assigns thereto a meaning comporting with accepted usage. It was the construction enunciated by this Court in *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, ("gold clauses *in* existing contracts", p. 297; "obligations *with* gold clauses", p. 313; etc.).

The contrary position (as taken by the court below) involves the absurdity that the coupons in suit never became obligations of the petitioner until the respondents

had elected, after their maturity, whether to demand payment in dollars or in foreign currency. That this conclusion would render it lawful to issue such coupons at this time, notwithstanding that they contained gold clause "provisions" of the character specifically condemned by the Joint Resolution and by the decision of this Court in *Norman* v. *Baltimore & Ohio Railroad Company*, 294 U. S. 240, further indicates the absurdity of the respondents' position.

Whether a contrary view would be taken by a foreign court, is irrelevant. The Joint Resolution provides the exclusive rule for our courts, *The Titanic*, 233 U. S. 718.

The contrary decision in the 2nd Circuit Court of Appeals, *Anglo-Continentale Treuhand* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11, overlooked entirely the all-important sentence of the Resolution (the sentence that directs that "every obligation" SHALL BE DISCHARGED upon payment, dollar for dollar, in legal tender), and as a consequence erroneously *assumed* that the language of the Resolution was contrary to the petitioner's position. The majority opinion in the Court of Appeals below in the present case, and the dissenting opinions in the Appellate Division, contain no independent reasoning whatsoever, but simply follow the 2nd Circuit Court of Appeals in its error. To the contrary, the opinions of Judge Rosenman at Special Term in No. 590 (R. 57), and of the 8th Circuit Court of Appeals in the case now here as No. 384, *Guaranty Trust Company* v. *Henwood*, 98 F. (2d) 160, contained comprehensive and careful discussions of the Resolution and of the purposes of the Congress in adopting it, and support petitioner's position.

II.

The Spirit and Intent of the Resolution.

The construction of the Resolution to be derived from its express language, is supported by considerations of the purpose and intent of the Congress in its enactment. Cf. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240.

Alternative provisions for payment in foreign currency abroad, if applied in our courts to yield a premium to the holder over the number of dollars expressed to be payable on the face of the same coupon, accomplish precisely the same evil sought to be accomplished by the clauses to which that effect was denied in the *Norman* case. Indeed, these very bonds in suit are a part of the $75,000,000,000 of "gold clause" bonds recognized by this Court in the *Norman* suit to have been the object of the enactment of the Joint Resolution.

A review of the economic conditions antedating the adoption of the Resolution, with particular reference to international trade and exchange, brings into relief the fact that these foreign currency payment provisions are an obstruction to the monetary policy of the Congress, even more direct than the dollar gold clause provisions to which they are an alternative.

No serious constitutional question is presented. The suggestions that the alternative foreign currency payment provisions are of rare occurrence, and that they relate to delivery of a commodity, were alike disposed of by the opinion of this Court in the *Holyoke Water Power Company* case, 300 U. S. 324, 340. This Court there dealt with a clause of rare occurrence (calling for delivery of a commodity, gold bullion), and broadly held that all such "verbal vari-

ants" alike fall within the condemnation of the Resolution, because they obstruct the exercise by the Congress of its monetary power.

ARGUMENT

I

By the express terms of the Joint Resolution, the coupons in suit are discharged upon payment dollar for dollar.

Section 1 of the Joint Resolution is made up of two clauses, (a) and (b). The pertinent provisions of clause (a) are as follows:

> "every *provision* contained in or made with respect to any obligation *which purports to give the obligee the right to require payment in gold* or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, *is declared to be against public policy;* * * *. Every obligation*, heretofore or hereafter incurred, *whether or not* any such *provision* is contained therein or made with respect thereto, *shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.* Any such provision contained in any law authorizing obligations *to be issued* by or under authority of the United States is hereby repealed * * *." [Italics ours.]

Clause (b) of the Joint Resolution reads as follows:

> "(b) As used in this resolution, the term '*obligation*' means *an obligation* (including every obligation of and to the United States, excepting *currency*) *payable in money of the United States;* and the

> term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations." [Italics ours.]

The Joint Resolution thus carefully distinguishes between an "obligation" (*i.e.*, a bond, coupon or other agreement or contract payable in money of the United States), and "provisions" for payment contained therein. See Point I, (a), *infra*.

The Joint Resolution also plainly recognizes that an obligation is "payable in money of the United States", although it contains a "provision" which gives the obligee a right to *require* payment (and is therefore alternatively payable) in something other than money of the United States, as gold bullion. "Payable" patently means "that may be, or is susceptible of being, paid". See Point I, (b), *infra*.

The key portion of the Joint Resolution, as applied to this case, is the second sentence of clause (a), which (after inserting the necessary definitions contained elsewhere in the Joint Resolution) reads as follows:

> "*Every obligation* payable in money of the United States, whether { heretofore / or / hereafter } incurred, { whether / or / not } there is contained therein or made with respect thereto any *provision* which purports to give the obligee a right to require payment in *gold* or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby,

> shall be discharged upon payment, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts." [Italics ours.]

Eliminating the "whether" and "whether or not" clauses, the Joint Resolution simply reads:

> EVERY OBLIGATION PAYABLE IN MONEY OF THE UNITED STATES SHALL BE DISCHARGED UPON PAYMENT, DOLLAR FOR DOLLAR, IN LEGAL TENDER.

The Joint Resolution, therefore, in express terms and, as we believe, without ambiguity, provides that "every obligation payable in money of the United States, shall be discharged, dollar for dollar, in that which is legal tender at the time of payment", whether or not such "obligation" contains a "provision" of the type specifically denounced by the first sentence of clause (a) or any other "provision" for an alternative mode of payment at the option of the obligor or obligee.

It was so construed in No. 590 by Mr. Justice Rosenman in his opinion at Special Term (164 Misc. 498, 500-501; R. 57).

This is the only construction which gives effect to every word in the Joint Resolution and assigns thereto a meaning comporting with accepted usage. It gives effect to the distinction which the Joint Resolution itself makes between the "obligation" (meaning, as we have said, the bond, coupon or other agreement or contract), and the "provision" or alternative provisions for payment *contained* in such obligation. It attributes to the word "payable" the meaning compelled by the context. It is the only interpretation which gives effect to the words *"whether or not* any *such*

provision [*i.e.*, such a 'provision' as is specifically declared contrary to public policy in the first sentence of clause (a)] is contained" in such "obligation."

But whether or not the Joint Resolution is to be given the above interpretation (and we recognize that that question is not squarely before the Court in this case), it *at least* provides that every "obligation" payable in money of the United States, *which contains* a "provision" specifically condemned in the first sentence of clause (a), shall be discharged, dollar for dollar, in legal tender,—regardless of whether such obligation is *also* payable in a medium other than money of the United States. The establishment of this proposition is sufficient to dispose of this case, since the coupons in suit are such obligations, containing such provisions (*i.e.*, provisions for payment in gold coin, a "particular kind of coin", or for payment in amounts "in money of the United States measured thereby").

Accordingly, we will direct our argument primarily to the establishment of such latter proposition. We have felt it proper at the outset, however, to call to the Court's attention the broader interpretation of the Joint Resolution which we believe correct, in order that our emphasis upon the narrower point involved herein be not taken as tacit acquiescence in the view that the scope of the Joint Resolution is limited to obligations containing provisions for payment specifically denounced therein.

(a) The coupons in suit are "obligations" within the meaning of the Joint Resolution.

Throughout the Joint Resolution, Congress has carefully distinguished between "obligations" and mere "provisions" for payment in obligations. The second sentence

of clause (a) affords one instance of that distinction. The same distinction is made in the next preceding sentence:

> "That (a) every *provision* contained in or made with respect to any *obligation* which purports to give the obligee a right to require payment in *gold* or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy. * * *" [Italics ours.]

and in the preamble, which refers (in the second paragraph) to "provisions of obligations". In the preamble, as in the last quoted portion of clause (a) of the Joint Resolution, the reference is primarily to the particular *provision* popularly known as the "gold clause".

In the coupons in suit there are several *provisions*, including:

> The "gold clause": "will pay * * * at its office or agency in the City of New York, U. S. A., TWENTY FIVE DOLLARS, United States Gold, * * *" (R. 12);[5]

and the alternative

> "Franc clause": "will pay * * * if paid in * * * Switzerland, Fcs. 129.50 * * *" (R. 12).[5]

Both are *provisions*, but in a single *obligation*,—the coupon itself.

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[5]The gold clause in the coupons in No. 591 is identical with that in No. 590 except that the word "Coin" follows the word "Gold" (Tr. 30). The guilder clause in the coupons in No. 591 is: "will pay * * * in Amsterdam, Holland, Sixty-two Guilders Twenty-five Cents * * *" (Tr. 30).

That the term "obligation", as employed in the Joint Resolution, is intended to denote not a "duty" or "legal liability", as hitherto suggested by respondents (and by petitioner in No. 384,—Pet. Br., pp. 74, 77), but is intended to denote, in accordance with accepted usage,[6] an "agreement" or "contract" (particularly an agreement or contract evidenced by a written instrument, as a bond, coupon, security, etc.) which is payable or dischargeable in money of the United States, is made plain by the Joint Resolution itself:

(1) It contains four references to "provisions of," and "provisions contained in" obligations. "Duties" and "legal liabilities" do not contain "provisions", but contracts and agreements (such as corporate bonds and coupons) do.

(2) The last sentence of clause (a) of the Joint Resolution refers to "obligations to be issued" by the United States. "Duties" and "legal liabilities" are not "issued", but bonds and coupons are.

(3) Clause (b) shows that the Resolution contemplates that note "currency" would be embraced by the term "obligation", unless expressly excluded therefrom. A United States, Federal Reserve, Federal Reserve bank or national bank, note is not a "duty" or "legal liability", but an agreement or contract.

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[6] Among the definitions of the term "obligation" given in Webster's New International Dictionary of the English Language (2d Ed., 1935) at page 1680, are the following:

"2. The agreement, promise, contract, oath, or the like, by which one is obligated or bound."

"8. Law. A bond with a condition annexed, and a penalty for nonfulfillment. In a larger sense, it is a formal and binding agreement or acknowledgment of a liability to pay a certain sum or do a certain thing."

The term "provision", when used in connection with the word "obligation" in the Joint Resolution, is used to denote a clause or promise providing for payment contained in, or made with respect to, an "obligation".[7] Thus, the first sentence of clause (a) specifically denounces "every provision contained in or made with respect to any obligation which purports to give the obligee the right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby." An "obligation" may, therefore, contain one or more "provisions".

These conclusions are confirmed by the decision of this Court in *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, wherein the opinion speaks of

> "the 'gold clauses' of private contracts for the payment of money" (at p. 291);
>
> " 'gold clauses' in existing contracts" (at p. 297);
>
> "The Government's own contracts—the obligations of the United States—" (at p. 306);
>
> "obligations with gold clauses" (at p. 313); and
>
> "gold bonds" (at p. 315).[8]

Respondents have heretofore urged, and petitioner in No. 384 continues to urge (Pet. Br., pp. 77-78), that the

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[7] Both the House and Senate committee reports on the Joint Resolution use the term "provision" in this sense and speak of "gold clauses" (H. R. Rep. No. 169, 73d Cong., 1st Sess.; Sen. Rep. No. 99, 73d Cong., 1st Sess.).

[8] For other authorities demonstrating that a "bond" constitutes a prime example of an "obligation", see *Munzinger* v. *United Press*, 52 App. Div. 338, at page 341, 65 N. Y. Supp. 194, at page 196; *Exchange Bank* v. *Ford*, 7 Colo. 314, 3 Pac. 449; and *Karasik* v. *People's Trust Co.*, 252 F. 324, 335 (S. D. N. Y.), affd. without opinion 252 F. 337 (C. C. A. 2d).

fact that the Joint Resolution contemplates that "obligations" may be "incurred" renders the interpretation of that term set forth above inconsistent with the language of the Resolution. But the inconsistency is purely imaginary. The standard authority (Webster, *op. cit.*, p. 1261) states that "incur" means, *inter alia*, "to become * * * subject to" and gives "contract" as the *only* synonym. Consequently, in the context of the Joint Resolution, "obligation incurred" means "agreement contracted" or "contract to which a party has become subject."[9] *We cannot emphasize too strongly that this conclusion is compelled by the language of the Joint Resolution itself. No other interpretation is possible.*

The application herein of the term "obligation" is, therefore, clear. The coupon itself (an agreement in writing) is an "obligation" within the meaning of the Joint Resolution. And the Congressional enactment is, not that any particular *provision* therein shall be discharged "upon payment, dollar for dollar, in legal tender," but that the entire *obligation* shall be so discharged.

(b) The obligations in suit are "payable in money of the United States" within the meaning of the Joint Resolution.

The Joint Resolution is all-embracing in its terms. Its subject-matter is expressed to be *"Every* obligation payable in money of the United States."

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[9]Petitioner in No. 384 also suggests that the fact that the Joint Resolution speaks in clause (b) of "every obligation of and *to* the United States" shows that the term "obligation" means "duty" or "legal liability", but it is perfectly obvious, in the context, that the reference is to agreements and contracts [payable in money] of the United States and agreements and contracts under which the benefits run to the United States.

The coupons in suit are "obligations" which are "payable in money of the United States." True, they are *also* alternatively payable in foreign currencies. But this cannot alter the fact that they are payable in dollars. As such, they are within the Resolution.

To maintain the contrary position, respondents and the majority in the Court below (R. 70) were forced to the argument that, because the obligations are alternatively dischargeable in foreign currencies, they are *not* obligations payable in dollars. But *obviously they still are.*

At most, this argument amounts to an assertion that respondents have the option whether payment be demanded in dollars or foreign currencies. But by demanding francs or guilders, they cannot *alter* the contracts themselves. They cannot change the terms of *the obligations* (the coupons) which remain

"obligations payable in money of the United States".

The fact that, in the absence of the Joint Resolution, the respondents might require that the coupons be discharged by payment in a medium other than dollars is immaterial. The Joint Resolution by its express terms makes it plain that obligations are "payable in money of the United States", even though the obligees have the right, by the terms thereof, to require payment in another medium. It expressly includes, among "obligations payable in money of the United States", obligations which contain "provisions" which purport to give the obligee a right to require payment in "gold". An obligation alternatively dischargeable in dollars or gold bullion *at the option of the obligee* would clearly be such an "obligation payable in money of the United States."

Thus, by the express terms of the Resolution, obligations (such as the coupons in suit) which "may" be paid,—are capable or susceptible by their terms of being paid,—in dollars, are "obligations payable in money of the United States", whether or not they also include alternative provisions for payment in a different medium at the obligee's option. And this, of course, accords with common usage.[10]

Aside from the fact that the express terms of the Joint Resolution, for reasons just stated, compel a conclusion contrary to the position taken by respondents and the majority of the Court below, the logical implications of their argument demonstrate its untenability. As stated by the Court below, in the only passage of its opinion assigning any reason for its decision, the argument is as follows (R. 71):

> "* * * the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency."

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[10]Webster's New International Dictionary of the English Language (2d ed., 1935), at page 1797, defines "payable" as follows:

> "1. That *may*, can, or should be paid; justly due.
>
> "2. Likely or able to yield a profit; profitable; as, to put a business on a payable basis.
>
> "3. Law. a. That *may* be discharged or settled by delivery of value. b. That is to be paid (by any particular person); as, bills payable; also, matured or maturing; due." (Italics ours.)

The same position has been taken by the petitioner in No. 384 which summarizes its contentions as follows (Pet. Br., p. 82):

> "In conclusion, * * * the instruments upon which the present claim is based were never 'obligations payable in money of the United States' because the option to receive payment in dollars was never exercised."

It necessarily follows, however, if this argument be sound, (1) that the bonds from which the coupons in suit were detached, and the unmatured coupons appurtenant thereto, will not become "obligations" (payable in money of the United States or otherwise) of this petitioner until the options therein are exercised; and (2) *consequently, that it would not be unlawful to issue bonds and coupons of identical tenor at the present time!*

The utter absurdity of these conclusions, in the teeth of the Joint Resolution, is manifest. But they are the conclusions which flow logically and inescapably from the argument of respondents, the majority of the Court below and the petitioner in No. 384. And with their rejection, that argument must likewise be rejected.

(c) Obligations payable in money of the United States within the meaning of the Joint Resolution (such as the coupons in suit) are dischargeable, dollar for dollar, in legal tender.

Once it is established that "obligations" (such as the coupons in suit) are "payable in money of the United States" (as these coupons are), it is the mandate of Congress that they "shall be discharged upon payment, dollar

for dollar,[11] in * * * legal tender", whether or not they contain gold clauses.

The coupons in suit *do contain* gold clauses. Consequently, as previously pointed out, there is no necessity for extended argument as to whether a multiple currency obligation not containing a gold clause is within the Joint Resolution. The coupons in suit are indisputably within the Joint Resolution.

Respondents' suggestion that they be withdrawn from the application of the Joint Resolution is, in reality, an invitation to construe the same as follows:

> "Every obligation (payable in money of the United States), whether heretofore or hereafter incurred,

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[11] We understand this to mean that the obligor shall have the right to discharge the obligation by payment, dollar for dollar, in legal tender. The suggestion in the brief of petitioner in No. 384 (pp. 82, 96-97) that an obligor *must* discharge dollar for dollar, and may not pay more than the face amount of the obligation (whether for the purpose of settling litigation or otherwise), or pay less than the face amount thereof (provided the obligee is willing to accept less), is without warrant. As hereinafter pointed out in greater detail, the Resolution was adopted for the purpose, *inter alia*, of preventing that dislocation of the domestic economy which would have resulted from *forcing* obligors to pay more than the face amount of obligations payable in money of the United States, but there is nothing in the Resolution which *requires* obligors to act under the authority therein conferred.

Equally without basis is such petitioner's contention (Pet. Br., pp. 96-97) that the Resolution, if construed as we urge it should be, would affect performance of those promises not involving payment which are contained in obligations payable in money of the United States. It is perfectly apparent from the most casual reading that the second sentence of clause (a) of the Resolution deals only with payment. (See *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, at p. 339.)

> which contains any such provision (*i.e.*, as is described in the first sentence of clause (a)) shall be discharged, upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts, unless such obligation shall contain an alternative provision or provisions other than those described in the first sentence of this clause (a), in which event such obligation may be discharged in accordance with such alternative provision or provisions."

In thus, in effect, suggesting (1) the substitution for the words of the Joint Resolution of other and different words, and (2) the addition thereto of words not to be found therein, respondents are requesting not construction, but amendment of the Resolution.

(d) To hold the Resolution applicable to the coupons in suit is not to give it extra-territorial effect.

It has been suggested by the respondents in the court below, and is urged by petitioner in No. 384 (see Pet. Br., pp. 61, 93), that to apply the Joint Resolution to the coupons in suit would be to give it extra-territorial effect. But this argument proceeds upon a misapprehension of our position.

We do not contend that a foreign court may not enforce the foreign currency provisions contained in these coupons in accordance with their terms. We do contend that anyone resorting to an American court to enforce these obligations is subject to the mandate of the Resolution, laying down a broad public policy, that the obligor shall have the right to discharge these obligations by payment, dollar for dollar, in legal tender. This is not to contend that the Resolution be given extra-territorial effect.

Nor is there any inconsistency between recognizing the right of a foreign court to enforce the foreign currency provisions in accordance with their terms, and maintaining the right of our courts to enforce the Joint Resolution in accordance with its terms. As stated by Mr. Justice Holmes in a similar case (*The Titanic*, 233 U. S. 718):[12]

> "It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline *altogether* to enforce that obligation on the ground that it is contrary to the domestic policy, *or may decline to enforce it except within such limits as it may impose.* * * * The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law, as against, for instance, Englishmen living in England who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law * * *" (pp. 732-733).
>
> "We see no absurdity in supposing that if the owner of the Titanic were sued in different coun-

[12] The actual decision in the cited case would seem to have been placed on the ground that the Limitation of Vessel Owners' Liability Act (R. S. 4283) prescribed the remedy available in American courts, but Mr. Justice Holmes also stated (at p. 733):

> "A law that limits a right in one case may limit a remedy in another. This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States."

tries, each having a different rule affecting the remedy there, the local rule should be applied in each case" (p. 734).[13] [Italics ours.]

Indeed, the right of the courts of the United States to refuse altogether to enforce causes of action or defenses based on foreign law, when to do so would conflict with domestic public policy, even though not expressed in legislation (as in this case), is well established. Stumberg, *Principles of Conflict of Laws* (1937), pp. 251-252; see *The Titanic, supra*, p. 732; *The Kensington*, 183 U. S. 263; *Union Trust Co.* v. *Grosman, et al.*, 245 U. S. 412.

The suggestion that the Joint Resolution should be construed to be inapplicable to the coupons in suit in order to avoid giving it extra-territorial effect is, therefore, completely without foundation.

(e) The decisions in the Court below and in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, failed to give effect to the plain and unambiguous language of the Joint Resolution.

As pointed out in the Statement, the judges in both courts below who have adopted respondents' position since the opinion of Judge Learned Hand for the Second Circuit Court of Appeals in *Anglo-Continentale Treuhand* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11, have simply accepted that opinion as correct.[14] But Judge Learned Hand's opinion had this glaring omission,—it wholly omitted to discuss the principal enacting sentence of the Resolution, viz., the second sentence of clause (a).

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[13] Cf. *Knott* v. *Botany Mills*, 179 U. S. 69.

[14] Dissenting opinion in Appellate Division, R. 67; prevailing opinion in Court of Appeals, R. 70.

It only quoted and discussed the first sentence of sub-paragraph (a), and the definition in clause (b). See 81 F. (2d) at page 12, col. 1. It put its principal weight upon the first sentence of clause (a), and went at once to the conclusion that, because gold clauses were expressed to be against public policy, neither the obligations in which they are contained, nor any of the other provisions thereof, were brought within the language of the Resolution.

A consideration of the all-important and governing sentence of clause (a),—viz. the second sentence,—shows that the proper construction of the Resolution is precisely the opposite of that *assumed* by the Second Circuit Court of Appeals. Instead of justifying the assumption (indulged by that Court) that the language of the Resolution does not apply to the present case, and, therefore, that the present case can be brought within it only by some interpretative application going beyond its express terms, the fact is that such language unambiguously covers this case, and that the respondents' effort to avoid the Resolution can only be accomplished by giving to the Resolution an "interpretation" which, in reality, requires the substitution and addition of other language.

That the petitioner in No. 384 now recognizes this problem, is borne out by the entire course of the discussion in its brief, particularly the fact that the first serious attempt at analysis of the terms of the Resolution commences at page 73 of such brief, with the argument that

> "Selected language of the Joint Resolution cannot be construed in disregard of the clear purpose of the Resolution as a whole, so as to destroy the guilder option in these bonds."

For the same reason, petitioner's counsel in No. 384 immediately preceded the last quoted argument by their discussion of the evil at which the Resolution was directed, attempting to show that it was not directed at the evil which would be represented by a decision against our position in the present case. They expected that, having established such a proposition, this Court would then be amenable to the above quoted argument to the effect that the Resolution ought to be construed in their favor, contrary to its express language.

We, of course, take precisely the opposite position. Although we agree that the express language is in our favor and should govern, we are satisfied to turn to an investigation of the Congressional purpose and to the evils at which the Resolution was aimed, for we are convinced that that investigation turns in our favor. Indeed, this was a primary ground of the decision in the Eighth Circuit Court of Appeals in No. 384. We now consider that subject.

II

The coupons in suit are within the spirit and intent of the Joint Resolution, as well as the letter thereof.

(a) The Congressional purposes in enacting the Resolution were, *inter alia:* (1) specifically to denounce every type of gold clause, and (2) to authorize the discharge, dollar for dollar in legal tender, of *every* obligation containing such a clause.

The term "gold clause" resolution, frequently applied to the Joint Resolution, is really a misnomer. The Joint Resolution is not confined in its application to, or directed

at, "gold clauses" alone, although it names them. A "gold clause" is but one of the various *provisions* of contracts payable in money of the United States which the Resolution specifically denounces.[15] Moreover, and of much greater importance, the principal enacting sentence of the Resolution (the second sentence of clause (a)) applies not to single "provisions" but to entire "obligations".

There is no doubt, however, that gold clauses *and* the obligations in which they were contained, occupied the attention of the Congress primarily at the time of the adoption of the Resolution, which constituted an integral part of a monetary program embracing, *inter alia*, the abandonment of the theretofore existing gold standard and the reduction of the gold content of the dollar. (See Point II (b), *infra*.)

The Congress realized that so-called gold clause bonds were, of all others, the instruments by means of which the business community had "by prophetic discernment" attempted to nullify any future devaluation (*Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 310, 315). They required payment of "gold value" (*ibid.*, pp. 302, 315). Consequently, an insupportable additional debt and interest burden would have resulted from devaluation had not the Joint Resolution been adopted (*ibid.*, p. 315). An estimated seventy-five billion dollars of "gold bonds" (*ibid.*, pp. 313, 315) with annual interest charges probably amount-

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[15]The provisions specifically declared to be against public policy in the first sentence of clause (a) of Section 1 of the Resolution include any provision "which purports to give the obligee the right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby". Thus, "silver coin clauses" or "Federal Reserve note clauses", etc., as well as "gold bullion", "gold coin" and "gold value" clauses, are specifically declared to be against public policy.

ing to between three and four billion dollars (*ibid.*, p. 313), the debt on which would have increased in inverse ratio to the percentage of devaluation (*ibid.*, pp. 302, 315), were outstanding.

But included in such "gold bonds", which were indisputably the subject matter of Congressional action, were the very bonds, the coupons of which are involved in this litigation.

The narrow question here presented is the extent to which Congress acted with respect to such bonds, for act it certainly did.

In attempting to answer that question to the satisfaction of the Court, we have already scrutinized with care the language of the Resolution. Viewing broadly the action taken, it is immediately apparent that Congress did not limit itself to negative action. It did not content itself with denouncing gold clauses and other provisions for payment. It acted affirmatively. It provided for discharge, but *not merely* of such clauses or any other "provisions" for payment. On the contrary, in broad and sweeping terms it provided that "every" obligation "payable in money of the United States" containing such clauses (and, indeed, whether or not such clauses were contained therein) should be discharged by payment, dollar for dollar, in legal tender. It did so with a view to affecting "all obligations within the range of the exercise of its constitutional authority" (*Norman* v. *Baltimore & Ohio R. Co., supra,* at p. 326).

Its purpose, among others, in so providing, was to *limit the measure of recovery* upon such obligations in the event of devaluation, so that the obligors should not

> "be required to pay $1.69 in [the new] currency while * * * receiving * * * their * * * prices * * * on the basis of $1 of that currency"

and thereby be exposed to that

"disparity of conditions"

which would encourage that

"dislocation of the domestic economy"

which it was also the Congressional purpose to avoid (*Norman* v. *Baltimore & Ohio R. Co., supra,* at p. 315).

The coupons in suit, and the gold bonds to which they were then attached, were, figuratively speaking, in the hands of Congress at the time of the adoption of the Resolution. Congress dealt with them. It provided for their discharge, dollar for dollar. Did it intend to provide that they should be so discharged *only if* dollars were demanded in this country in the *first* instance, but that $1.69 per dollar must be paid if the demand for dollars in this country was postponed pending an obviously futile demand for foreign currencies abroad? Was required payment in excess of the face amount any less palatable to it in the one case than in the other?

The Congress did not *purport* to draw any such refined distinction in this practical legislation.[16] Indeed, the language that it employed was quite to the point. It prescribed a certain and uniform treatment for every bond containing a gold clause that should appear. Such *bonds* should be discharged, dollar for dollar, in their face

[16]The Resolution was a practical piece of legislation designed to remove practical obstructions to the exercise of the power to regulate the value of money. Gold bonds did not, of course, in theory interpose any obstruction to devaluation of the currency. Their practical *effect*, with which the Congress was concerned, however, was such as to preclude devaluation so long as they remained enforceable in accordance with their terms.

amount. The gold clauses contained therein stamped them indelibly as instruments obstructive to the exercise of the power over the currency. No further inquiry was necessary. Certainly, the presence of alternative provisions for payment which (upon enforcement) would have the same effect, would afford no occasion for a change in the treatment prescribed.

One may search in vain, as, indeed, have respondents and petitioner in No. 384, for any evidence that the Congress intended to exclude *any* gold bond from the mandate for uniform discharge thereof set forth in the Resolution. The most that respondents may say is that Congress, while employing language sufficiently broad to include all gold bonds, did not specifically advert to the alternative foreign currency provisions therein. (See brief of petitioner in No. 384, p. 58 *et seq.*)

But that, it is most respectfully submitted, is entirely beside the mark. We do not argue that the Congress gave affirmative consideration to gold bonds containing such alternative clauses, any more than we would argue that Congress gave consideration to all the "verbal variants" of gold covenants referred to in the opinion of this Court in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 340. Our point is that, without attempting to explore in detail the innumerable "verbal variants", Congress provided that *all* gold bonds should be discharged, dollar for dollar, in legal tender. This the Congress was privileged to do:

> "No principle of constitutional law, no dictate of fair dealing, lays a duty upon the Congress to single out for special treatment an individual or a few among the members of a common mass." (*Ibid*, at p. 341.)

We are dealing here with gold bonds which are types of a general class. To permit the enforcement of these particular gold bonds in accordance with their terms, contrary to the mandate of the Resolution, would be to sanction *pro tanto* a frustration of the statutory purpose. Even if the Resolution were ambiguous (which it is not), it could not properly be construed to permit such a result in the absence of convincing evidence of a Congressional intention to achieve such result. But, as heretofore pointed out, there is no such evidence.

We think, therefore, that the inquiry as to the construction of the Joint Resolution should properly end at this point. To pursue it further is really to conduct an inquiry on this question:

> Would Congress have created an exception to the mandate which, as actually enacted, plainly and unambiguously covers the obligations in suit, had it specifically considered such obligations in its deliberations prior to such enactment?

We pursue such inquiry in the interest of completeness, although recognizing, for reasons heretofore stated, that it is really not necessary to do so.

The answer to the question put is an emphatic negative.

(b) The legislative history of the Resolution and the conditions which gave rise to its adoption show that its sweeping language was advisedly employed and that there was no intention to except from its application gold bonds which are alternatively payable in foreign currencies.

As previously pointed out, the adoption of the Joint Resolution was a necessary concomitant of the abandon-

ment by this country of the theretofore existing gold standard and of dollar devaluation. It is appropriate, therefore, to consider briefly the causes of such abandonment and devaluation.

The gold standard has, of course, both international and domestic significance. Among its attributes from an international standpoint is the equilibrium which it creates between various currencies in terms of gold. For many years that equilibrium remained relatively undisturbed and, when one national spoke in terms of units of the currency of another, he was, in effect, speaking in terms of units of gold. This was true in 1910 and 1912 at the time of the issue of the bonds from which the coupons in suit were detached.

Commencing in the year 1929 and with increasing frequency thereafter, however, that equilibrium was disturbed by a series of shocks resulting from one country after another going off the gold standard or adopting foreign exchange controls equivalent thereto.

The prevailing cause for this action was inability or prospective inability to export sufficient goods and services to balance the sum of imports and foreign debt obligations. Accordingly, each such country sought to increase its exports by depreciating its currency, in which its merchants paid for labor and raw materials, and thus enabling them to sell their products in foreign countries at prices lower in terms of foreign currencies.[17] This almost immediately resulted in increased foreign sales at the expense of mer-

[17]The general experience in the case of such devaluations has been that the domestic price level does not immediately rise in anything approaching an inverse ratio to the percentage of devaluation of the currency in terms of gold.

chants of those countries which remained upon the gold standard.

The first great collapse was that of Austria in the Spring of 1931, and then followed the German collapse in the Summer of 1931. This placed a tremendous pressure on England, whose economic life-blood depended on an active foreign trade. In September of 1931 England likewise abandoned the gold standard, in order to be able to cut its prices and protect its international markets. Sixteen other countries followed within three months.

By the Winter of 1932-1933, most of the nations of the world had defaulted upon their obligations to the United States, had abandoned the gold standard, had imposed varying restrictions on foreign exchange, had directly or indirectly depreciated their currencies and had restricted their imports by exceptionally high tariffs. Such imports as were essential were, for the most part, purchased from countries such as England which was not on the gold standard and whose merchants could afford to sell at a lower price than could the merchants of the United States who had to purchase their raw materials and pay their labor in terms of gold.

During the years 1925-1929, the United States had annual exports of almost Five billion dollars ($5,000,000,000), but primarily because of the factors discussed above exports shrank in 1933 to $1,302,000,000 (World Almanac, 1938, at p. 309).

The inability to compete in foreign trade with countries not on the gold standard forced American merchants (1) to attempt to dispose within the United States of the surpluses which ordinarily would have been sold in foreign trade, and (2) to reduce production, which resulted in in-

creasing unemployment, curtailment of purchasing power and contraction of the domestic market. The surplus, in terms of available market, inevitably led to excessive competition, which drove domestic prices down in a vicious spiral. The wholesale price index of *all commodities* in the United States fell from 95.4 in 1927 to 65.9 in 1933 (World Almanac, 1938, at 358.[18]

Within the months immediately preceding the opening of the Seventy-third Congress, business was prostrate, due, in no small measure, to the enormous loss of foreign trade. The national income had shrunk to an alarming extent, with a proportionate and disastrous increase in the debt burden. Panic psychology existed throughout the land. There had been a great and growing increase in bank failures. Many of the banks, including many which were solvent, were on the verge of closing. Confidence in the monetary and financial systems of the country had been shaken. Gold in large quantities was going into hiding or in flight to foreign countries.

These are facts of common knowledge of which the Courts will take judicial notice (*Atchison, etc. Ry. Co.* v. *United States,* 284 U. S. 248, 260). They are established, moreover, by the statistical publications of Departments of the Federal and State Governments, and by the provisions and recitals of the several statutes, proclamations, executive orders and regulations which deal with the monetary measures of the Federal Government since March 4, 1933, reviewed at length in *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, at pages 295-297.

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[18]The wholesale price index for various commodities is tabulated in the World Almanac, 1936, at page 366, and it there appears that the decline in many commodities which had their principal markets abroad was even more serious.

It was in the light of these conditions that the Seventy-third Congress adopted the monetary legislation of 1933-1934. We will touch upon only so much thereof, and of the executive action thereunder, as is of particular interest here.

Specie payment was suspended and the payment, exportation or transfer of gold or gold bullion were in effect prohibited by executive action[19] on March 6, 1933. This action was ratified by the National Banking Emergency Relief Act of March 9, 1933 (48 Stat. at L. 1), and reinforced by said Act and executive action taken thereunder shortly after its passage.[20] The United States was thus temporarily off the gold standard, at least for the purpose of most transactions, and the dollar began to depreciate somewhat in foreign and domestic markets.

On May 12, 1933, the Agricultural Adjustment Act was passed (c. 25, § 43, 48 Stat. at L. 31, 51). Section 43 of that Act empowered the President to reduce the gold content of the gold dollar to any extent not less than 50% of its existing content *if he should find certain facts to exist.* The findings required by the Act were:

> "* * * that (1) the foreign commerce of the United States is adversely affected by reason of the depre-

[19]Proclamation of the President dated March 6, 1933 (48 Stat. at L. "Proclamations of the President", p. 1) pursuant to the Act of October 6, 1917 (c. 106, § 5, 40 Stat. at L. 415, as amended by the Act of September 24, 1918 (c. 176, § 5, 40 Stat. at L. 966)); Instructions by Secretary of the Treasury to Treasurer of the United States, dated March 6, 1933, approved by the President.

[20]Proclamation of the President dated March 9, 1933 (48 Stat. at L. "Proclamations of the President", p. 3); Executive Order No. 6073, March 10, 1933; Executive Order No. 6102, April 5, 1933; Executive Order No. 6111, April 20, 1933.

> ciation in the value of the currency of any other government or governments in relation to the present standard value of gold, or (2) action under this section is necessarily in order to regulate and maintain the parity of currency issues of the United States, or (3) an economic emergency requires an expansion of credit, or (4) an expansion of credit is necessary to secure by international agreement a stabilization at proper levels of the currencies of various governments * * *."

Thus, the first purpose expressed by the Congress in authorizing devaluation was to protect the foreign commerce of the United States against depreciation in the values of foreign currencies. This purpose was referred to in *Norman* v. *Baltimore & Ohio Railroad Company*, 294 U. S. 240, at page 296, and was in fact one of those set forth in the Presidential Proclamation by which the dollar was devalued on January 31, 1934 (No. 2072, 48 Stat. at L. 1730).

The Joint Resolution was adopted June 5, 1933, and constituted a necessary step preliminary to devaluation.

That the Congress was acutely aware of the important connection between the Joint Resolution and the recapture of the American export market is illustrated not only by this review of the history of the times and the legislation in *pari materia* with the Resolution, but also by the debates on the Resolution itself.[21]

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[21]The subject of the relationship between the abandonment of the gold standard, American foreign trade, and the Joint Resolution was probably that most extensively discussed in the Congressional debates on the Joint Resolution. See, *e.g.*, the remarks of Senator Borah (77 Cong. Rec. 5003-5004 (June 3, 1933)) and of Senator Wheeler (77 Cong. Rec. 4996 (June 3, 1933)).

With this background in mind, we return to the question posed at the outset of this discussion: What response would Congress have made to a request that gold bonds of the character involved herein be excepted from the terms of its sweeping mandate?

With every confidence we assert that it would most emphatically have denied such request. We say this because, of all gold bonds, such bonds containing foreign currency provisions would have been *least* likely to have received or *merited* exceptional treatment from the Congress.

As we have already seen, such bonds are precisely similar in their effect on American obligors generally to bonds providing only for payment in dollars measured by gold. They must, therefore, have been regarded by the Congress as equally obstructive to its regulation of the currency. (See Point II (a), *supra.*)

Moreover, the foreign holders of such bonds, for whose convenience the gold value foreign currency provisions therein were inserted, were, by very force of circumstances, more favorably situated than American holders of single gold clause bonds. As previously pointed out, the very purpose of devaluation of the dollar was to permit American goods to be sold abroad at a reduction in the gold value price corresponding to the reduction in the gold content of the dollar. Foreign purchasers have benefited by the lower prices which devaluation made possible for American exports. There is no apparent reason why the Congress should have intended also to give them an advantage over American holders in the receipt of income from American bonds.

In any event, there is not the slightest evidence of any Congressional intent to discriminate in favor of either foreign holders or any other group of obligees.

Congress must also have recognized that, if obligations of this character were excluded from the Resolution, American producers, such as the petitioner, for whose primary benefit devaluation was authorized, would, by virtue of the fact that they were also obligors on such bonds, be deprived, wholly or in part, of the benefit of, and perhaps be penalized by, devaluation. Such obligors, as a result of devaluation, sell in foreign markets on the basis of the dollar of depreciated content and, therefore, receive fewer units of foreign currencies per sale than prior to devaluation. Consequently, payment of their multiple currency obligations on the basis prescribed in the Resolution merely tends to maintain the *status quo ante* devaluation. Payment on the old standard would, therefore, tend to place them at a greater disadvantage than prior to devaluation. It is fanciful to suppose that Congress intended to accomplish such a result, at variance with its intent as expressed in the Agricultural Adjustment Act and at odds with what may reasonably be believed to have been its desire to accord equal treatment to all debtors on dollar obligations.

In the light of the acknowledged purposes of the Congress and the all-embracing language of uniform application employed in the Resolution, the conclusion that the coupons in suit are subject thereto is, we respectfully submit, beyond dispute.

(c) One of the broad underlying purposes of the Resolution was to place all obligations payable in money of the United States, whatever their provisions for payment, upon a parity.

We have thus far concentrated upon a showing that Congress intended, *inter alia*, in adopting the Resolution t

provide a uniform method of discharge for all gold bonds payable in money of the United States, whatever their alternative provisions for payment. This emphasis has been proper because the narrow question here presented is whether Congress excepted a particular class of gold bonds.

The scope of the Resolution, however, is not so limited. One of the broad Congressional purposes in adopting it was to place upon a parity of discharge *all* obligations payable in money of the United States, whatever the provisions for payment contained therein. This intention is made articulate in the sweeping language of the second sentence of clause (a) of Section 1 of the Resolution.

The second sentence of clause (a) is the principal *enacting* portion of the Resolution. It states the goal that the Congress was attempting to reach, namely, that "every obligation" payable in money of the United States should be discharged upon payment, dollar for dollar, in legal tender. The Congress recognized that various types of provisions for payment contained in such obligations would, if enforced, prevent the attainment of that end. It singled out for express condemnation in the preamble and first sentence of clause (a) certain such provisions, including those then most common. But it was not obliged to make a census of all such provisions or specifically to enumerate the same (*Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 340-341). This was particularly true since it was legislating for the future as well as the present. Accordingly, by the broad, all-inclusive language of the second sentence of clause (a), it prevented the enforcement in accordance with their terms, not only of those "provisions" which it had seen fit to enumerate specifically in the earlier portion of the Resolution, but of all "provi-

sions" calculated to have like effect, viz., to prevent discharge of obligations payable in money of the United States, dollar for dollar, in legal tender.

This reconstruction of the Congressional intent is the only one which gives effect to every word which the Congress employed in the Resolution, *i.e.*, which gives effect to what Congress *did* in the Resolution. It is also the only reconstruction consistent with its undoubted intention to formulate a general and lasting policy of uniform application which would prevent the recurrence in the future of situations obstructing the exercise of its power to regulate the value of the money of the United States.

If respondents' contentions herein be sustained, that policy may be rendered completely nugatory. As matter of routine, obligations may be so drawn as to hedge against further devaluation of the dollar by incorporating provisions for alternative payment in all foreign currencies which may be expected to enjoy or obtain a premium over the dollar in the event of devaluation. The Congress intended to leave no such loophole.

(d) Respondents' contention that serious constitutional questions will be presented if the Resolution is held applicable to the obligations in suit is unfounded.

Respondents below and petitioners in No. 384 (Pet. Br., 88 *et seq.*) have suggested that a construction of the Joint Resolution holding it applicable to the coupons in suit would raise grave doubts as to the constitutionality of the legislation. It is suggested that the Resolution, so construed, would go beyond the permissible limits of the authority delegated to the Congress in relation to the currency and contravene the Fifth and Tenth Amendments to the Constitution.

We think no lengthy discussion of these contentions is required and that the constitutionality of the Resolution as so applied is clearly established by the decisions of this Court in *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, and *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324.

The first ground on which the constitutionality of the Resolution is attacked is that "there has been no showing * * * that multiple currency clauses actually interfere with the exertion of the monetary power granted to Congress" (see Petitioners' Brief in No. 384, pp. 59, 91). Two points are made in this connection, first, that multiple currency provisions are found in less than 1% of the seventy-five billion dollars or more of gold clause dollar obligations, and, second, that no recitals specifically finding that such provisions obstruct the power of Congress over the monetary system are set forth in the preamble of the Resolution.

To this contention there are three answers:

(1) Whatever the percentage of gold clause dollar obligations which contain such provisions, they constitute an integral part of the class of gold bonds.

(2) Precisely the same argument as to the volume of obligations outstanding was expressly considered and rejected in Mr. Justice Cardozo's opinion for this Court in the *Holyoke Water Power* case (subheading 4 at p. 340 of 300 U. S.).

(3) As appears from this Court's opinion in the *Norman* case (at p. 311 of 294 U. S.), the question is not whether Congress made an express finding concerning clauses in obligations of the character in suit, but whether they "constitute an actual in-

terference with the monetary policy of the Congress in the light of its broad power to determine that policy". From the discussion which has preceded, it is perfectly plain that multiple currency clauses in gold bonds constituted an obstruction to the exercise of the Congressional power over the currency identical in character with the gold clauses in the obligations considered by this Court in the *Norman* and *Holyoke Water Power* cases.

The second constitutional challenge is predicated on the ground that the Resolution, if applied to the coupons in suit, would be extra-territorial legislation (see Petitioners' Brief in No. 384, p. 93). This contention has already been completely disposed of (Point I(d)).

Thirdly, it is contended (Pet. Br., pp. 61, 93), that the obligations in suit are commodity contracts and, as such not subject to regulation. This contention is not seriously pressed. The coupons are negotiable money contracts (Uniform Negotiable Instruments Law, § 1(2), § 6(5); *Incitti* v. *Ferranti et al.*, 12 N. J. Misc. 840, 175 Atl. 908; *Black* v. *Ward*, 27 Mich. 191; *King* v. *Hamilton*, 12 Fed. 478 (D. Ore.); *Hogue* v. *Williamson*, 85 Tex. 553, 22 S. W. 580; see *Brown* v. *Perera*, 176 N. Y. Supp. 215, 220 (not officially reported—aff'd without opinion, 182 App. Div. 922); *Hebblethwaite* v. *Flint*, 185 App. Div. 249, 173 N. Y. Supp. 81). Even if the multiple currency clauses be thought of as technically calling for commodities, the Resolution's constitutionality in its application to the obligations in suit is unquestionable The Resolution in terms applies to obligations payable in money of the United States containing gold bullion provisions and

has been sustained by this Court in its application thereto (*Holyoke Water Power Co.* v. *American Writing Paper Co., supra*). There exists no tenable distinction between this case and the *Holyoke* case. Foreign currencies partake no more of the character of ordinary commodities than gold bullion; and the fact that provisions calling for payment therein stand side by side in the same obligation with a provision calling for payment in money of the United States and obstruct the exercise of the power to regulate that money constitutes an adequate basis for Congressional jurisdiction.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 590

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

No. 591

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A.G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A.G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A.G., a Liechtenstein corporation,
Respondents.

On Writs of Certiorari to the Supreme Court of the State of New York, New York County.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1938

BETHLEHEM STEEL COMPANY, *Petitioner,* *against* ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED, *Respondent.*	No. 590
BETHLEHEM STEEL COMPANY, *Petitioner,* *against* ANGLO-CONTINENTALE TREUHAND, A. G., *et al.*, *Respondents.*	No. 591

On Writs of Certiorari to the Supreme Court of the State of New York, New York County.

PETITIONER'S REPLY BRIEF

I.

THE MEANING OF "OBLIGATION" IS A FEDERAL, NOT A STATE, QUESTION.

It is argued that, under the doctrine in the *Erie Railroad* case, 304 U. S. 64, the Court of Appeals of the State of New York has finally determined that the word "obligation" in the Joint Resolution means a "debt" or "legal liability", and not a contract. The inference is drawn that this decision is binding upon this Court.

If this position be sound then it follows that the Joint Resolution means something different in every State. The Court of Appeals may construe it one way;[1] the Supreme Judicial Court of Massachusetts another way; and the highest court of Louisiana a third way.[2] But it is inadmissible to argue that a Joint Resolution of the Congress expressive of a national public policy should be so construed (at least, unless the language absolutely compels such construction) as to deprive the Resolution of uniformity.

The argument, therefore, turns on its maker, and provides another, and to our minds unanswerable, ground for declining to construe the word "obligation" in the way contended for by the respondents. The courts must give to the word "obligation" the construction that the Congress intended, and must presume that that construction was intended to be uniform. The only construction that meets this standard is the construction which interprets "obligation" as covering *all* contracts which may be paid in money of the United States.

II.

Application of the Joint Resolution to foreign money provisions does not compel its application to wheat or other mere commodity provisions.

The respondents have argued that these foreign money provisions must be treated exactly like

[1] Indeed, two judges of the Court of Appeals dissented, implying that another court might well give a different construction.

[2] A likely contingency, as the general system of law in Louisiana rests on different (civil law) foundations.

ordinary commodity provisions, for example, as if contained in coupons reading:

> "Bethlehem Steel Company will pay to the bearer at its office or agency in the City of New York $25 United States gold, or deliver in London, 25 bushels of Number 1 Winter Wheat."

And then the question is asked by counsel on the other side: "Would our courts refuse to give recovery in the number of dollars representing the exchange value of Number 1 Winter Wheat delivered at London?"

But the argument leads nowhere, for no reason appears why the Congress should be inhibited, in enacting legislation of public import, from recognizing plain economic facts. In *Deutsche Bank Filiale v. Humphrey*, 272 U. S. 517, this Court distinguished between foreign money and an ordinary commodity, and applied to a default in payment of foreign money a rule different from that applicable to a failure to deliver a commodity abroad.

No financier or business man, at least during the period of free international exchange during which these bonds were being issued, ever regarded an obligation to pay alternatively in dollars in New York or pounds sterling, as other than providing two *money* alternatives.

The whole conception that provisions for payment in pounds sterling, guilders or Swiss francs alternatively to dollars must be treated by the Congress exactly like agreements to deliver wheat, horses or rare folio manuscripts, parts company with reality and common sense. It is common ground between all parties that the Congress, in adopting the Joint Reso-

lution, was thinking of the typical corporate and governmental bond issues. But no one ever saw or conceived of a bond issue providing that each holder should receive $1;000 in New York, or at his option, one fine Arabian steed at Tattersall's in London. The argument is at most a testimonial to the imagination of eminent counsel confronted by a case difficult of support in practical experience.

The governing consideration is that the provision for payment in foreign money is, and was intended as, a *substitute* money provision, and so falls within the principle of *Holyoke Water Power Company* v. *American Writing Paper Company*. 300 U. S. 324.

We need not concede that the language of the Resolution would not cover an alternative provision for discharge of a particular obligation by delivery of wheat or a horse or whatnot. But in any event, that is a different case; and the decision in this case will not preclude consideration of such a case if ever it arises.

III.

Significance attaches to the complete failure to attempt to meet certain of our arguments.

Without burdening this Reply Brief with repetition of the arguments themselves there is reasonable application for the presumption that an argument which the opposition has chosen wholly to ignore, is worthy of special consideration. We, therefore, respectfully call the Court's attention to the fact that neither the petitioner in No. 384 in its reply brief nor the respondents in Nos. 590 and 591, have ever made any real *attempt* to meet our arguments

(1) That if no alternative provision for payment in a medium other than United States money may fall within the condemnation of the Resolution, the Resolution does not reach an alternative provision for payment in gold bullion. But the Resolution plainly embraces obligations containing such alternative gold bullion provisions.

(2) That, if the bonds in suit do not become "obligations" (within the meaning of the Resolution) until the holders have elected where to demand payment, then the gold clause provisions themselves remain valid until the election, and if the election be to demand payment abroad (as in these cases), the gold clause provisions never become invalid at all; wherefore, even the express condemnation by the Congress of the gold clause provisions is nullified. The truth, of course, is that the Resolution condemns *all* gold clause provisions from the outset. But this could not be the case, if a bond or coupon never became an "obligation" (within the meaning of the Resolution) until after the election where to demand payment.

(3) That the ground upon which this Court sustained the Resolution in the *Norman* case, 294 U. S. 240, as an obstruction to the power of Congress over the currency was the dislocation of the domestic economy that would have resulted had debtors been required to collect their revenues in the new dollars and to pay their debts upon the basis of the old.

(4) That alternative foreign money payment provisions of this character can be employed in the future, under the respondents' view, with the effect of wholly nullifying the Resolution. The respondents' dilemma is brought into clear relief by the concession twice made by petitioner in No. 384 that the question whether provisions of this character are intended to evade the effect of the Resolution, "might become relevant" in

the future (No. 384, pet. brief, pp. 35-36, 85). But if such a provision might become invalid in the future, it was equally invalid in the past.

IV.

Respondent in No. 591 is in error in asking this Court to consider the question of state law involved in the claim of *res ajudicata*.

The respondents in No. 591 have urged that they may bring forward any ground, whether Federal or non-Federal, in order to sustain the judgment appealed from, and have cited for this proposition *Langnes* v. *Green*, 282 U. S. 531 and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555.

Neither of these cases is applicable, since both involved appeals from a lower Federal court.

The law is expressly contrary to respondents' contention when a case is brought to this Court from a state court. *Murdock* v. *City of Memphis*, 20 Wall. 590; *Sauer* v. *New York*, 206 U. S. 536; *Monson* v. *Simonson*, 231 U. S. 341; *First National Bank* v. *Anderson*, 269 U. S. 341, 346; *Missouri* v. *Public Service Commission*, 273 U. S. 126, 131; *Robertson & Kirkham*, "Jurisdiction of the Supreme Court of the United States", p. 147.

In any event, even if the question of *res ajudicata* were open in this Court, it was not raised by said respondents in their complaint or by their motion papers in the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinions of the Court of Appeals (R. 70, 72) are not reported. The majority of the Appellate Division wrote no opinion. The minority opinion (R. 67) is reported in 254 App. Div. 839, 840, The opinion of Mr. Justice Rosenman at Special Term (R. 57) is reported in 164 Misc. Rep. 498.

Statement of the Case.

The suit is for damages for breach of contract in refusing to pay on demand 129.50 Swiss francs on each of 1455

semi-annual interest coupons (R. 10, 11) detached from 323 First Consolidated Mortgage Bonds owned by the respondent (R. 9) issued in the City and State of New York (R. 7) by Lackawanna Steel Company, a New York corporation (R. 7), in 1910 (R. 7) of which the petitioner has become the successor-obligor (R. 8, 9).

The alternative promises to pay are expressed in the bonds and coupons as follows (R. 12, 13):

$1,000.
U. S. Gold

£205.15.2 stg., M. 4,200 D. R. W.
Guilders 2,480 Francs 5,180

UNITED STATES OF AMERICA
State of New York

No. .....

LACKAWANNA STEEL COMPANY

Series A 5% Series A 5%

CONVERTIBLE

FIRST CONSOLIDATED MORTGAGE GOLD BOND DUE 1950

LACKAWANNA STEEL COMPANY (hereinafter called the Steel Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, on the first day of March, 1950, ONE THOUSAND DOLLARS in gold coin of the United States of America or in London, England, £205.15.2 Sterling, or in Frankfort o/M., Germany, 4200 Reichsmarks, or in Amsterdam, Holland, 2480 Guilders, or 5180 Francs, if paid in France, Belgium or Switzerland, and to pay interest on said principal amount from March 1, 1910, respectively in said respective currencies, at the rate of five per centum per annum, semi-annually, on the first days of March

and of September in each year, upon presentation and surrender of the interest coupons hereto annexed, as they severally mature.

FORM OF COUPON.

$25.

On the first day of 19 , unless the bond hereinafter mentioned shall have been duly called for previous redemption, LACKAWANNA STEEL COMPANY will pay to the bearer at its office or agency in the City of New York, U. S. A., TWENTY-FIVE DOLLARS, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M., Germany, M. 105, or in Amsterdam, Holland Gl. 62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond Series A, No. .....

$25 U. S. Gold
£5.2.10½ Stg.
Marks, 105.
Guilders, 62.
Francs, 129.50.

J. P. Higginson, Treasurer.

REVERSE SIDE.

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M., at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

The respondent, an insurance company of the Republic of Switzerland, purchased the bonds with the coupons attached for value and before maturity (R. 29, 30). The petitioner says in its statement (p. 5) that it pleaded that the respondent acquired its bonds with intent to evade the Joint Resolution. The statement is quite gratuitous. There is no such question in the case. No such question is argued. No such question survives the decision of the Court of Appeals in any event.

After the maturity of the coupons in suit, the respondent made presentment and demand to the petitioner's designated paying agent in Zurich and payment was refused (R. 32, 38).

Questions Presented.

1. Does the Joint Resolution of June 5, 1933 (48 Stat. L. 112), known as the "gold clause" resolution, deprive the holder of a multiple currency bond of his option, where by the terms of the contract he has the choice of receiving payment in a stated number of dollars in New York in gold, or a stated number of pounds in London, or a stated number of guilders in Amsterdam, or a stated number of Reichsmarks in Frankfort, or a stated number of francs in France, Belgium or Switzerland, and does it annul the obligation to pay the stated number of francs in Switzerland, when the holder has elected to receive payment in francs in Switzerland and has demanded payment of the obligor's designated paying agent in Zurich?

2. If so, does the Joint Resolution violate the Fifth Amendment of the Constitution of the United States?

We think the above presents the issue more sharply than does the petitioner's statement.

Statute Involved.

(Public Resolution—No. 10—73rd Congress)
(H. J. Res. 192)

JOINT RESOLUTION

To Assure Uniform Value to the Coins and Currencies of the United States.

WHEREAS the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

WHEREAS the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar

for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of Section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

> "All coins and currencies of the United States (including Federal reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4:40 p. m.

Decisions Below.

The Special Term of the Supreme Court of New York, on a motion for summary judgment, overuled the respondent's contentions that the Joint Resolution did not affect its right to the relief demanded in the complaint and that if construed as affecting such right it was unconstitutional for offending the Fifth Amendment of the Constitution of the United States (R. 3) and held that the respondent was only entitled to judgment for $25 per coupon, the same as though it had elected to receive payment in dollars not francs, gave judgment for the amount so calculated, and dismissed the complaint for any damages in excess of that amount (R. 4).

The Appellate Division of the Supreme Court of New York affirmed by a divided court, three to two, the majority writing no opinion, Mr. Justice Untermyer dissenting in an opinion in which Mr. Justice Callahan concurred (R. 67, 68).

The Court of Appeals of New York by a vote of five to two reversed and held that "on the facts of this case, the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency" and directed judgment for the respondent, Judge O'Brien writing for the majority and Judge Finch for the minority. (R. 71).

The petitioner says in its statement (Brief, p. 4) that that gives the respondent a premium on "the face dollar amounts of the coupons" and later on (*Id.*, 36) treats the

suit itself as a demand for dollars that had been deferred pending what it calls "an obviously futile demand" for Swiss francs, thus confusing a suit for damages for the breach of its promise to pay a specified number of Swiss francs with a demand for payment in dollars and ignoring the fact that its own default made it necessary to bring suit in a forum in which dollar damages only can be assessed.

SUMMARY OF ARGUMENT.

I. The obligation sued on is not an "obligation payable in the money of the United States", but is an obligation arising wholly from an independent promise to pay a stated number of Swiss francs in Zurich, Switzerland.

II. The Joint Resolution does not purport to touch the obligation in suit.

III. Upon the petitioner's construction the Joint Resolution violates the Fifth Amendment of the Constitution of the United States for (a) abrogating contract rights which did not obstruct the intended exercise of power by the Congress, and (b) arbitrarily discriminating between creditors in the same class.

ARGUMENT.

POINT I.

The obligation sued on is not an "obligation payable in the money of the United States", but is an obligation arising wholly from an independent promise to pay a stated number of Swiss francs in Zurich, Switzerland.

The decision of the Court of Appeals of New York on the construction of the contract and the legal effect of the exercise of its option by the respondent, involving as it does questions solely of local law, is binding on this Court.

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64 (April 25, 1938);

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202 (May 2, 1938).

It is not claimed that the Joint Resolution touches an obligation payable in Swiss francs in Switzerland.

It may be assumed that had the holder demanded payment in dollars in New York, it would have had to accept legal tender dollars, dollar for dollar, and could not have required payment in gold dollars, despite the "gold clauses" in the bonds and coupons.

The holder's election to receive payment in Swiss francs, evidenced by its presentment to and demand upon the petitioner's designated paying agent in Zurich, has in legal effect eliminated the gold provisions or clauses from the contract as effectively as though they had never been in the contract. There is here no question of payment in gold,

and no question of paying in the equivalent of gold dollars, or any kind of dollars. The obligation sued on, and the only obligation now in effect, is one to pay 129.50 francs in Switzerland on each coupon.

The dissenting Judges below were quite in error in supposing that the respondent was seeking to recover the equivalent of United States money in foreign currency (R. 73). It is seeking damages for the breach of an obligation to pay a stated number of Swiss francs without any regard to gold or the money of the United States. Since it has to seek relief in an American court its damages have to be assessed in dollars, but the breach complained of is the refusal to pay on demand 129.50 Swiss francs for each coupon presented.

There is no question of equivalence to gold or gold dollars in this case, such as was involved in *Holyoke Water Power Co.* v. *American Writing Paper Co.* (300 U. S. 324). The equivalence that matters is equivalence at the stated time of payment. That was one of the reasons that determined the alternative promises involved in that case, both of them, to be promises to pay money rather than to deliver gold as a commodity. Naturally when the alternative promises in the instant case were made, the specified quantities of the different currencies were equivalent. But the promise to pay a specified amount of each, as demanded by the holder at maturity, was necessarily made on the assumption that they might not be equivalent at that time and that the holder would demand performance of the alternative most favorable to him at the time of performance and to put those risks on the obligor. That is what makes the alternative promises involved in the instant case wholly independent. That is why the choice by the holder of one obliterates

all the others from the contract. That is why the alternative promises to pay in specified amounts of each of the foreign currencies named are not dollar promises and are no different in legal effect from independent alternative promises to pay in specified quantities of wheat, cotton or other commodities.

Obviously the alternative promises at the option of the holder were a great inducement to intending purchasers, who were thus assured of a wide market in which they could sell the bonds purchased and were also protected against the fluctuations of the currencies involved by having the right to demand payment in any one of them.

Purpose of Alternative Promises to Pay Specified Amounts of Each Currency Named.

The alternative foreign currency provisions were not "gold value foreign currency provisions" and were not inserted for the convenience of foreign holders as the petitioner says (Brief, p. 44). They said nothing about gold. A specified amount of the currency chosen by the holder was to be paid regardless of its relation to gold or the dollar at the time of payment. Had convenience in making payment been the purpose in mind, the promise would have been to pay the stated number of dollars, or their equivalent at date of payment in each of the other currencies named.

But each of the alternative promises was wholly independent of the others. No matter what happened to the dollar, the pound, the guilder, or the reichsmark, if the holder demanded payment in Zurich he was entitled to receive a stated number of Swiss francs, no more and no less, and the other alternative promises were in legal effect completely obliterated from the contract, having no more force

or effect than as though they had never been made. The obligation, the duty, of the obligor was then absolute to make payment in Swiss francs only and was not different in legal effect from an obligation to pay in wheat or any other commodity. How the obligor was to obtain the francs with which to make payment is of no concern. That was its lookout. The only purpose of specifying the exact amount of each currency which the holder could choose was to put the risk of fluctuations on the debtor.

Propositions Finally Settled by the Decision of the Court of Appeals.

(a) The alternative promises were wholly independent and of equal rank.

(b) The respondent, as a *bona fide* owner of the bonds from which the coupons in suit were detached, rightfully exercised its election to receive payment in Zurich in Swiss francs, 129.50 to the coupon.

(c) Upon the exercise of that right all of the alternative promises except the one chosen were eliminated from the contract as though never contained in it and the contract is to be enforced precisely as though it had originally contained only the one promise chosen by the holder.

See—

American Law Institute, Restatement of the Law of Contracts, Sec. 325 (2), *Comment a.*

(d) The illegality or impossibility of performance of the alternative promise to pay a specified number of gold dollars in New York did not relieve the petitioner of the obligation to pay the specified number of Swiss francs in

Zurich, which by the respondent's election has now become absolute.

See—

Yankton Sioux Tribe v. *United States*, 272 U. S. 351, 358-9;

Twaits v. *Penn. R. R. Co.*, 77 N. J. Eq. 103, 110; 75 Atl. 1010, 1013;

American Law Institute, Restatement of the Law of Contracts, Sec. 344, *Comment b;* Sec. 469;

Williston on Contracts, Vol. III, Secs. 1779, 1961.

The holding by the Court of Appeals that "on the facts of this case" the obligation sued on "was not payable in money of the United States but in foreign currency" settles those propositions, which the petitioner no longer contests.

Had there originally been, as there now is, only the one promise to pay 129.50 Swiss francs in Switzerland, the Joint Resolution would not apply to it. That is undisputed.

Is the chosen promise unenforceable and is the holder deprived of the right of election given him by the contract by reason of the fact that if he had elected to receive gold dollars he could not have enforced the alternative so chosen?

The Joint Resolution denied effect to the "gold clauses". The election of the respondent eliminated it from the contract.

POINT II.

The Joint Resolution does not purport to touch the obligation in suit.

Undoubtedly it is to be construed with the other Acts of the Congress in *pari materia*. This Court has already

considered those acts in their bearing on the purpose of the Congress in abrogating "gold clauses."

Norman v. *B. & O. R. R. Co.*, 294 U. S. 240.

The Thomas Amendment.

The Thomas Amendment of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. L. 51) empowered the President to do a number of things in case he found, upon investigation, "that (1) the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currency of any other government or governments in relation to the present standard value of gold, or (2) action under this section is necessary in order to regulate and maintain the parity of currency issues of the United States, or (3) an economic emergency requires an expansion of credit, or (4) an expansion of credit is necessary to secure by international agreement a stabilization at proper levels of the currencies of various governments". Among other things he was authorized to fix the weight of the gold dollar from time to time at not less than 50 per centum of its then present weight "as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies".

One of the dominating purposes thus revealed was, by lowering the value of the dollar, to reestablish, as far as might be, its former relation with other depreciated currencies, with the thought in the background of ultimately securing a stablization of currencies at proper levels by international agreement.

Devaluation alone would not accomplish the desired objective. The fluctuations in foreign currencies were too great and too variable, and were influenced by too many factors peculiar to each and wholly beyond the reach of the Congress. Devaluation might lead to an international agreement and in the meantime it would help to raise domestic prices and to some extent minimize the harmful effect of the depreciation of foreign currencies on our foreign commerce. The petitioner appears to assume (Brief, pp. 39-45) that the sole effect of the devaluation of the dollar on foreign commerce and foreign exchange within the contemplation of the Congress was its effect on our export trade. The recovery of our export trade doubtless was one of the main objectives aimed at, but of course the other necessary effects of devaluation were within the contemplation of the Congress. If the dollar were devalued, it would require less foreign exchange to buy dollars with which to purchase American goods or discharge dollar obligations and more dollars to buy foreign currencies with which Americans could purchase foreign goods or discharge obligations payable in such currencies. The Congress must have intended all of those effects since it could not produce one without the others. Manifestly it could not control the incidences of variable and diverse currency fluctuations. Those incidences would necessarily fall on some more heavily than on others. It was not possible to restore the former relation between the dollar and each of the foreign currencies.

The petitioner says (Brief, pp. 39, 40) that most of the nations of the world had already "directly or indirectly depreciated their currencies" and that most of their imports were "purchased from countries such as England".

Thus devaluation of the dollar tended as far as it went to restore the *status quo ante*. It did, except for temporary fluctuations, approximately restore the former relation between the dollar and the pound, concededly the most important of foreign currencies. That imposed no hardship on American debtors owing obligations payable in pounds or on American purchasers of English goods. It merely took away an advantage they had had after the pound went off gold and before the dollar was devalued. Most of the other foreign currencies had fallen more than the pound. Devaluation of the dollar to its former level with the pound merely lessened the advantages that American debtors owing debts payable in such currencies and American purchasers of goods of the countries having such currencies had enjoyed from the depreciation of such currencies. The Dutch guilder and the Swiss franc had not yet, though they have since, been devalued. Indeed of late they have been approaching their former relation to the dollar. Manifestly, the Congress could not deal with each foreign currency in detail. The situation confronting the Congress, as described by the petitioner, was that most of the nations of the world had depreciated their currencies. The Congress had to deal with that situation as a whole, leaving the incidences of variable fluctuations to fall as they might. Transactions in guilders or Swiss francs were not of sufficient consequence to stay the action the Congress decided upon to protect our foreign commerce from the adverse effects of the very general depreciation of foreign currencies, and moreover Holland and Switzerland were likely to join the procession, as in fact they have done. At most there can be only a limited amount of obligations of Americans

payable in Swiss francs or Dutch guilders that were outstanding when the dollar was devalued.

The bonds in suit were issued in 1910. A number of other bonds issued during that period by American corporations were wholly foreign currency bonds, as is well known. Americans were then borrowers from Euprope. Following the World War we became a creditor nation. We could no longer borrow in Europe. We became lenders. As is well known, billions of dollars were loaned by Americans to Europeans on dollar bonds. Indeed that has been assigned by many as one of the causes of the debacle of 1929. The foreign currency bonds issued by American corporations prior to 1914 still outstanding in 1933 must have been relatively few compared with the dollar bonds on which Americans had loaned money to Europeans prior to 1930. The devaluation of the dollar enabled European debtors to discharge their dollar obligations to American creditors with the devalued dollars and the Joint Resolution was equally impartial to foreign debtors.

Of course the Congress was aware of that situation. Criticism of foreign loans by American bankers was rife. Those loans were passed on to the public. Yet, if we accept the assumption made and question posed by the petitioner, petitioner would have us believe that while Congress took no heed of the effect of devaluation on the vast number of American creditors holding dollar obligations payable by foreigners, it would, nevertheless, if it had thought about it, have relieved the relatively few American debtors still owing obligations payable in foreign currencies either absolutely or at the option of the holders.

Obviously the Congress intended to leave the effects of devaluation on foreign commerce and foreign exchange

untouched, except as it undertook to stabilize the exchange value of the dollar. Those effects were beyond its control. It was at least hoped that on the whole they would balance. There certainly was no thought of attempting to deal with them in detail or of varying the general rule for exceptional cases.

Other Acts *in Pari Materia*.

Certainly the Congress did not intend to inhibit imports or the fulfillment of obligations payable in the currencies of other countries. By the Emergency Banking Act of March 9, 1933 (48 Stat. L. 1), the President had been empowered to regulate or prohibit "by means of licenses or otherwise, any transactions in foreign exchange" (*Id.*, Sec. 2), and the Secretary of the Treasury was authorized to require the surrender of gold (*Id.*, Sec. 3).

We emphasize the fact that the Executive Order of March 10, 1933 (No. 6073) provided *inter alia:*

> "No permission to any banking institution to perform any banking functions shall authorize such institution to pay out any gold coin, gold bullion or gold certificates except as authorized by the Secretary of the Treasury, nor to allow withdrawal of any currency for hoarding, *nor to engage in any transaction in foreign exchange except such as may be undertaken for legitimate requirements, for reasonable traveling and other personal requirements, and for the fulfillment of contracts entered into prior to March 6, 1933.*" (Italics ours.)

All acts of the President were confirmed by Section 13 of the Gold Reserve Act of January 30, 1934 (48

Stat. L. 337). That Act by Section 10 (a) authorized the Secretary of the Treasury to deal "in gold and foreign exchange, etc." *to stabilize the exchange value of the dollar.**

Thus under the authority of Acts *in pari materia* with the Joint Resolution, foreign commerce, foreign exchange, the payment of debts in foreign currencies contracted before March 6, 1933, and the stabilization of the exchange value of the dollar, were dealt with as fully and completely as the Congress intended to deal with them by monetary legislation. Normal transactions in foreign trade were to be continued. Debts payable in foreign currencies incurred prior to March 6, 1933, were to be discharged according to their tenor.

However, one problem that would be created by devaluation and by the suspension of gold payments remained unprovided for. Gold dollar obligations arising under "gold clauses"—seventy-five billions of them—created that problem. When the Act was under consideration in the Congress the amount, as shown by the debates, was thought to be $100,000,000,000. Those clauses, as construed by this Court in the *Norman* case, were "gold value" not "gold coin" clauses. If the dollar should be devalued as much as the Congress had authorized—50 per cent.—it would

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* The Attorney General of the United States in his Opinion dated August 22, 1933 (37 Op. of Atty. Gen'l. 250), dealing with an application by a New York corporation, under Executive order of April 20, 1933, to the Secretary of the Treasury for license to export gold coin of the United States to Belgium to fulfill a contract entered into in Belgium in 1932, held in effect that the Joint Resolution of June 5, 1933, did not relieve American obligors from the requirement to fulfill such obligations payable abroad in gold dollars only.

require two of the devalued dollars to discharge one dollar of such obligations. That would create a dual monetary system, a new dollar worth only its gold content in the payment of gold dollar obligations and legal tender in the payment of all other dollar obligations. If the gold obligations had been of limited amount, it would have been of no particular consequence, as the Committee on Banking and Currency said in its report to the House of Representatives on the Joint Resolution (H. R. Rep. No. 169, 73rd Cong., 1st Sess.). But they were being adopted almost as a matter of routine and the outstanding amount of them had assumed such proportions that a dollar of unequal debt-paying power, especially with a difference of 50 per cent., would seriously dislocate our domestic economy. And so the Joint Resolution was passed to deal with that problem and nothing else.

The Joint Resolution.

The Congress did not leave its purpose in passing that Resolution to inference, though that purpose is plainly revealed by the contemporary Acts above referred to. It stated in the title its purpose: "To Assure Uniform Value to the Coins and Currencies of the United States." It stated in the preamble its purpose, which it asserted to be its "declared policy * * * to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts". Debts payable in foreign currencies did not affect that purpose or that policy one iota. It might take more dollars to buy Swiss francs after devaluation than before, just as it would take more dollars to buy any other commodity after devalu-

ation than before. But the dollars used would all be of equal purchasing and debt-paying power. The money of the United States used would be of uniform value.

Even if the obligations of Americans payable in Dutch guilders or Swiss francs, either absolutely or in the alternative, had been larger, the guilders and the francs to discharge them could still be bought with dollars of equal purchasing and debt-paying power. The stabilization of exchange value was dealt with by the Gold Reserve Act. The maintenance of equal purchasing power and of equal paying power in the payment of dollar debts was dealt with by the Joint Resolution.

The Congress was not dealing with debts payable in foreign currencies when it passed the Joint Resolution. There is not a word in the Resolution, in any report or in anything said in debate to indicate it, despite the footnote on page 43 of the petitioner's brief. There is and can be no pretense that absolute obligations payable in foreign currencies were within the terms of the Joint Resolution, however it be construed. Debtors owing such obligations were left to bear the burdens or enjoy the benefits of variable fluctuations in the relation of the dollar to foreign currencies as events turned out.

American creditors to whom gold dollar obligations were owing, no matter by whom, had to accept the devalued dollars, dollar for dollar. The fact that foreign debtors owing gold dollar obligations—it has been estimated that between fifteen and twenty billions of foreign dollar bonds had been sold to the American public in the 1920's—were treated the same as American debtors and that no special consideration was given to the Americans who had bought such bonds

is cogent, if not conclusive, evidence that the Congress was dealing with the direct end to be attained, not its indirect effects, and had no more occasion to give special consideration to the relatively few American debtors still owing obligations payable in Swiss francs or Dutch guilders at the option of the creditors than it actually gave the American holders of at least fifteen or twenty billions of foreign dollar bonds.

Confusion of thought results from the failure to distinguish between dollars of unequal value, or debt-paying power, in the payment of dollar obligations and dollars of equal value and buying power in the purchase of foreign currencies or other commodities. Foreign currency obligations have to be paid in those currencies, not in dollars. How those currencies are obtained by the debtor to discharge his debt is of no moment. He may exchange other commodities for them or buy them with dollars, but his debt is paid with the particular currency promised, not with what he exchanges for the required amount of that currency.

There was certainly no occasion and obviously no intention to treat purchasers of foreign currencies with which to pay creditors, who happened to have a rejected option to require payment in dollars, any differently than purchasers of foreign currencies with which to pay creditors who had no such option, or indeed any differently than purchasers of other commodities. More of the devalued dollars would be required in either case. That was the necessary effect and indeed one of the declared purposes of the Thomas Amendment. Creditors and debtors, purchasers and sellers were all affected in different ways and in varying degrees dependent on circumstances.

The Congress certainly did not intend to single out one small class of purchasers of foreign currencies for special treatment. The Joint Resolution was passed to assure the uniform value of United States money and to maintain the equal power of the dollar. The Congress had no more thought of attempting to control the incidences of that any more than it attempted to control the incidences of devaluation. It was dealing with the monetary system of the United States, not with the incidental effects of its action on any group or class.

The petitioner assumes that the Congress gave no consideration to multiple currency bonds when it passed the Joint Resolution and poses the question whether, if it had done so, it would have excepted them (Brief, p. 38).

It would be more pertinent to inquire whether, not having included obligations in terms absolutely payable in foreign currencies, it could have intended to include obligations which were to become absolutely payable in a foreign currency upon the exercise of a right of election plainly given the payee by the contract. Of course the Congress knew that Americans owed obligations absolutely payable in foreign currencies. It plainly did not intend to include them in the Joint Resolution. Of course it knew that there were multiple currency bonds outstanding which might, as the holder should elect, become payable in some foreign currency. If it had intended to include them in the latter event, it would have said so in plain words, and in that case it would also have included all obligations payable in foreign currencies as well, for it cannot be supposed that it intended to exclude creditors who were bound to accept a foreign currency and include those who had the choice of receiving either a specified number of dollars or a specified

amount of a foreign currency in the event that the foreign currency was chosen. If the Congress did intend such a discrimination, then it intended to deprive holders of a plain contract right of election. Surely such an intention should not be ascribed to the Congress in the absence of plain words requiring it. Such an intention cannot be spelled out of the words "every obligation payable in money of the United States heretofore or hereafter incurred". In reducing the second sentence of the enacting clause of the Joint Resolution to its lowest terms, the petitioner omits the last four words above quoted and also the significant phrase "whether or not any such provision was contained therein or made with respect thereto" (Brief, p. 19), but later explains that the former omission is of no consequence because to "incur" means—the petitioner is careful to say "*inter alia*"—"to become subject to" and is synonymous with "contract" (Brief, p. 24). Thus "obligation incurred" means, says the petitioner, "agreement contracted" or "contract to which a party has become subject"; or, it might have added, if different definitions had been selected, "debt incurred". All of which goes to show how much can be proved by judicious use of the dictionary.

We submit that if the Congress had intended to abrogate foreign currency obligations or to deprive holders of the contract right to require payment in foreign currencies, it would have said so in plain words, and would not have defined "obligation" as an obligation "payable in the money of the United States" and would not have used the phrase "shall be discharged upon payment, dollar for dollar", which is appropriate only to dollar obligations.

The petitioner assumes that the Joint Resolution can not apply to the promises to pay dollars in gold in New

York unless it applies to the alternative promises as well and so reaches the *reductio ad absurdum* that on the respondent's construction it would not be unlawful "to issue bonds and coupons of identical tenor at the present time", since they will not become payable in the money of the United States unless and until the holder so elects (Brief, p. 27). That overlooks the first sentence of the enacting clause which has more than one important bearing on the meaning of the second sentence. Its concluding words are "and no such provision", *i. e.*, gold clause, "shall be contained in *or made with respect to* any obligation hereafter *incurred*" (italics ours).

The Determination Made by the Congress to Support Its Enactment.

The petitioner has heretofore argued that the preamble is of little significance in determining the intent and purpose of the Congress. It does not repeat that argument in this Court.

Undoubtedly enacting clauses, if plain and unambiguous, will control over preambles. But the particular preamble involved had more than usual significance. The Congress knew that its proposed enactment would be challenged in the courts. It knew that serious doubts of its constitutional validity were entertained by many. So it made and stated in the preamble a determination to support its enactment. This Court held that that determination was not so destitute of any basis as to warrant the Court in going behind it. It would indeed be surprising under those circumstances to find an enactment not fully supported by the determination.

It is undisputed that the determination stated in the preamble only relates to so-called "gold clauses", to the particular provisions "which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby". Such provisions only, not alternative and independent provisions, were determined to be an obstruction to "the power of the Congress to regulate the value of the money of the United States" and inconsistent with its declared policy.

It is likewise undisputed that the first sentence of the enacting clause deals only with "gold clauses". They, and they alone, were declared to be against public policy and forbidden for the future. That invalidated the contingent promise found in the bonds and coupons in suit to pay, in New York, dollars in gold coin of the United States, and made it impossible for the obligor to perform that particular promise if it had been chosen, but that did not relieve it of the duty to perform any of the other alternative and wholly independent promises.

See citations *ante*, p. 13.

It did not deprive the holder of the choice to receive payment in Zurich in Swiss francs, and we again emphasize the fact that the promise was to pay a stated number of Swiss francs, not the equivalent of a stated number of dollars in Swiss francs, as the dissenting Judges below erroneously supposed.

The contention of the petitioner is thus necessarily narrowed to the proposition that the Congress having, for the purpose of supporting its enactment, made a determination that "gold clauses" obstructed its power and were inconsistent with its declared purpose, and having like-

wise enacted that such clauses were against public policy and forbidden, then proceeded to enact *by implication* that provisions purporting to give the obligee the option to require payment either in money of the United States or in foreign currency or other media shall be construed and enforced as giving the obligee the right to require payment in money of the United States only, irrespective of whether the particular provision for payment in money of the United States is a "gold clause" or not; and indeed the petitioner does so contend (Brief, p. 19), but adds that for the purposes of the instant case it is only necessary to hold that the obligee's right of election is destroyed if the provision for payment in money of the United States is one of those "specifically condemned" (Brief, p. 20).

That implication is derived from the second sentence of the enacting clause which, paraphrased, reads, "Every obligation payable in the money of the United States heretofore or hereafter incurred, whether or not a gold clause is contained therein, shall be discharged dollar for dollar, etc."

If the petitioner's construction be accepted at all, the sentence means that a promise to pay in money of the United States, whether in gold or not, or at the option of the obligee in other media, is a promise to pay in the money of the United States only.

The petitioner proves too much. It cannot save the situation by suggesting that the Court stop half way. There is no stopping place at the "specifically condemned" provisions. If the second sentence is applicable to the foreign currency provision in suit, it would be equally applicable if the dollar promise had made no reference to gold but had merely been a promise to pay $25 on each coupon. The

phrase "whether or not any such provision is contained therein or made with respect thereto" makes that conclusive.

The second sentence of the enacting clause was either intended to make the devalued dollar legal tender for all dollar obligations, whether payable in gold or not, as we contend, or it was intended to make all obligations payable in dollars, if there was a single optional provision payable in dollars though not in gold.

Construing "obligation" as meaning "the instrument creating the debt or obligation" and "payable" as meaning "may be payable", it may be possible to work out a literal interpretation requiring obligees having an option to require payment in dollars or other media to accept dollars. If those words were used in that sense, the sentence may mean that. It cannot by that method of interpretation mean less.

Thus the petitioner's construction is a good example of distortion by etymological dissection and reconstruction. It ignores the declared purpose and intent of the Act. It disregards the context. It convicts the Congress of making a sham determination to support a palpable invasion of constitutional rights, having no possible support either in fact or in the determination made. Requiring a creditor, who has a plain contract right to receive 129.50 Swiss francs, to accept $25 in discharge of the obligation due him could not be justified on the ground that the discharge of the obligation according to its terms would obstruct or interfere in the slightest with the power of the Congress over the monetary system of the United States or with its declared purpose and intent. An optional contract right to receive Swiss francs could not be put in a different class

from a contract right to receive Swiss francs and nothing else.

Moreover the regulation of foreign exchange, the discharge of obligations payable in foreign currencies and the stabilization of the exchange value of the dollar were exclusively dealt with by the other Acts *in pari materia* above referred to and in a manner to make it manifest that the intention was to facilitate and not to inhibit or interfere with normal transactions in foreign exchange.

A few quotations may be pertinent:

> "It is not proper to confine the attention to the one section to be construed. 'It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution.'" (*Lewis' Sutherland, Statutory Construction*, 2d Ed., 1904, pp. 707-8.)

> "The words 'shall upon arrival in such State or territory be subject to the operation and effect of the laws of such state or territory,' in one sense might be held to mean arrival at the state line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a

whole, and not by distorting or magnifying a particular word found in it." (*Rhodes* v. *Iowa*, 170 U. S. 412, 421.)

"The point is made, however, that the word 'obligations,' as it occurs in another part of the act, has been given a narrower construction, and that this is persuasive of the restricted meaning contended for here. That much may be conceded, since 'there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.' *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. But since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." (*Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 86-7.)

"Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." (*Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258.)

The Court of Appeals has construed the contract and determined the rights and obligations of the parties "on the facts of this case", and has held that the obligation in the instant case was not "payable in the money of the

United States". In other words, the Court of Appeals has held, as the law is, that the rights and obligations of the parties are precisely the same as though the contract had originally contained but one absolute promise, namely, a promise to pay a stated number of Swiss francs in Switzerland.

No one claims that the Joint Resolution touches such a promise. Is a promisee in worse case who also had the alternative of demanding a stated number of dollars whether in gold or not?

It has heretofore been urged that there was no point in the second sentence of the enacting clause, unless the Congress intended to go beyond the first sentence and the preamble and strike down not merely the particular provisions, *i. e.*, "gold clauses", determined to be an obstruction to its power and inconsistent with its declared purpose and declared to be against public policy, but also the entire instrument containing such clauses as well. If so, it was certainly very inept in expressing its intention. That argument has not been repeated in the petitioner's brief for it plainly was necessary to go further. Without more it would have been left in doubt how obligations created by the condemned clauses were to be discharged, or even whether they were to be discharged at all, and so the Congress was careful to remove that doubt and to implement what had been enacted and determined by providing, as we say, that the condemned "gold clauses" should be put in the same class with all other dollar obligations and discharged in the same manner.

Certainly such a construction must be preferred to one which would abrogate vested contract rights not found by the Congress to be an obstruction to its power or incon-

sistent with its purpose and in respect of which there is no basis for such a finding.

Petitioner's Argument Based on Selected Dictionary Definitions.

Abandoning most of the arguments it has heretofore made, the petitioner attempts to prove by selected dictionary definitions of isolated words that "The Joint Resolution by its express terms makes it plain that obligations are 'payable in money of the United States,' even though the obligees have the right by the terms thereof to require payment in another medium" (Brief, p. 25). It should have added "and are not payable in such other medium even though the obligees have actually exercised their contract right to require payment therein".

Having thus proven to its own satisfaction that the instant case is within the letter of the Act, the petitioner poses the question whether the Congress *"would"* have excepted bonds "alternately payable in foreign currencies" if it had thought about them (Brief, p. 38). It concludes from other acts *in pari materia* that if the Congress had given consideration to the subject it *would* have relieved the petitioner and those in like case of contract obligations made burdensome by the world economic collapse and would have deprived obligees of their contract rights to require payment in other media than the money of the United States in those cases only in which obligees had a rejected and unenforceable option to require payment in dollars in gold, indeed even in cases in which there was a dollar option without any reference whatsoever to gold. A promise to pay $25 in New York or, at the option of the promisee, 129.50 Swiss francs in Zurich would be just as

plainly within the letter of the Act as one to pay in the alternative $25 in gold or 129.50 Swiss francs. Both, under the petitioner's construction of the Act, would be "payable in money of the United States" and discharged by the payment of $25. A creditor having no choice but to receive 129.50 Swiss francs could recover damages for their nonpayment. A creditor having the choice of receiving $25, whether in gold or not, or 129.50 Swiss francs would have to be satisfied with the payment of $25.

The question is what did the Congress intend, not what it would or might have intended if it had considered matters which the petitioner assumes it did not consider.

We learn the intention of the Congress from the whole Act construed with all the other acts *in pari materia*. In no case did the Congress leave its intent and purpose to inference. Some other or different intent and purpose is not to be ascribed even though it may be within the letter of an isolated phrase. The Act gives us a definition which was plainly intended to exclude obligations payable in other media than the money of the United States.

Dictionary definitions, with their subtle shades of meaning, are certainly no more than aids to interpretation.

> "* * * definitions by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others" (*Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96).
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> "The same words may have different meanings in different parts of the same act and of course words may be used in a statute in a different sense from that in which they are used in the Constitution" (*Lamar* v. *United States*, 240 U. S. 60, 65).

"Obligation incurred" certainly connotes a debt incurred even according to the dictionary meanings of "obligation" and "incur", whilst "obligation issued" may refer to the instrument evidencing the debt. "Payable" may mean, according to the dictionaries, either that which *is* payable, or that which *may be* payable. Even a carefully drawn Act may use the same words with different shades of meaning, and the draughtsman may not be conscious of the subtle distinctions which a studious critic may discover with a scalpel. But certainly the Joint Resolution was too carefully drawn to have left it to be inferred from subtle distinctions that obligees having the plain contract right to require payment in other media must accept dollars if they also had an option to demand dollars, if that had been the intention. Yet the petitioner is at last driven to the position that that is the precise effect of the Act according to its construction.

The word "obligation" does appear to have been somewhat loosely used. But the definition "payable in money of the United States" could only have been intended to differentiate between obligations payable in money of the United States and obligations payable in foreign currencies or other media. The latter were thus plainly put outside the Act. It is difficult to conceive of the use of that definition to distinguish between obligations in terms solely payable in foreign currencies or other media than the money of the United States and those so payable by the lawful choice of obligees who also might have demanded payment in dollars. And it is quite impossible to conceive of any legitimate reason for making such a distinction.

We assume that the alternative promise to pay dollars in gold is within the Act irrespective of whether it is within

its letter, but we submit that the contract right of holders to require payment in other media was not abrogated or intended to be abrogated by the Act even though the phrase "every obligation payable in money of the United States, heretofore or hereafter incurred", may literally be interpreted to mean the instrument under which the duty or obligation is incurred.

Meaning of Term "Gold Clause":

The petitioner says that the term is a misnomer, that the Joint Resolution is not confined to "gold clauses", that the Congress did not "content itself with denouncing gold clauses *and other provisions for payment*" (Brief, pp. 33-35). The subtle addition of the words we have just italicised should not escape notice.

Of course the term does include any coin or currency of the United States. It was in fact defined by the Congress itself in Joint Resolution No. 63 of the 74th Congress, approved August 27, 1935, thus:

> "* * * 'gold clause' means a provision contained in or made with respect to an obligation which purports to give the obligee a right to require payment in gold, or in a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, declared to be against public policy by Public Resolution Numbered 10 of June 5, 1933;" (49 Stat. L. 939).

One of the preambles of that Resolution stated the purpose of the Congress in passing the "gold clause" resolution and the end intended to be attained precisely as the respondent contends the actual intention was:

"Whereas in order to maintain the uniform value of all coins and currencies of the United States, Public Resolution Numbered 10 of June 5, 1933, declared provisions known as 'gold clauses' to be against public policy, prohibited their use in obligations thereafter incurred, *and provided that money of the United States legal tender for obligations generally was legal tender for all obligations with or without gold clauses;*" (49 Stat. L. 938). (Italics ours.)

"Obligations with or without gold clauses" obviously means dollar obligations since there is and can be no possible manner of doubt that foreign currency obligations *generally* were expressly excluded from the Joint Resolution by the definition "payable in money of the United States".

The purpose thus plainly stated was to put all dollars on a parity and to make them legal tender for all dollar obligations and not "to place all obligations, whatever their provisions for payment, upon a parity," as petitioner contends.

The Government certainly assumed in the *Norman* case that the "gold clause" resolution was limited to "gold clauses" and that assumption seems to be implicit in the judgment of the majority of this Court, as we read it.

The *Norman* Case.

We quote from the summary of the argument as officially reported (294 U. S. 273-278):

"The importance of the gold clause is due to the overwhelming amount of obligations calling for payment in gold coin issued and outstanding on June 5, 1933, the best estimates placing the amount at approximately $100,000,000,000.

"Congress was justified in declaring that gold clauses are contrary to public policy and inconsistent with our present monetary system. The gold clause had its origin in a period when there was in existence a dual monetary system;—that is, two kinds of money, United States coins and circulating notes, were permitted to circulate, fluctuating in value one against the other. * * *

* * * * * * * *

"* * * During February and until March 6, 1933, when the banking holiday was proclaimed, $476,100,000 in gold was withdrawn from the Federal Reserve Banks and the Treasury.

* * * * * * * *

"Gold clauses, if enforceable, would have obstructed the exercise of the monetary and other powers of the Federal Government, whether such clauses are construed to call for payment in gold coin itself or in an asserted equivalent in currency. The gold clause would nullify the power of the Congress to make all forms of coins and currency of the United States legal tender for all payments. It is an obstruction to the power of the Congress to regulate the value of money by changing the gold content of the dollar. * * * Non-enforcement of gold clauses results in no real loss to creditors. * * *

* * * * * * * *

"Gold clauses are an obstruction to the power of Congress to borrow money; for pending a change in the gold content of the dollar, bonds would be issued which might incur for the taxpayers a debt greatly in excess of the amount received for the bonds. It would be impractical to eliminate the gold clause from future issues only, since investors would prefer the old issues, public or private, to such an extent as to require prohibitive rates on the new.

"Gold clauses, by interfering with a change in the gold content of the dollar, obstruct the power of Congress to regulate foreign exchange and foreign commerce.

* * * * * * *

"The gold hoarding orders, independently of the Joint Resolution of June 5, 1933, require that the claim on the bonds be limited to the face amount thereof. A free domestic gold market did not exist, in consequence of these orders, from the time of the banking holiday in March, 1933, to the present. The gold clause should be interpreted as calling simply for payment in gold coin. (Citing cases.) Payment in gold coin is impossible and illegal because of the gold hoarding orders, and should be excused. (Citing cases.) Recovery is properly limited to the face amount of the bonds. Since if gold coin were paid to the creditors it would be worth to them only its face amount, payment of a greater sum would be a windfall, not indemnity for loss. (Citing cases.)"

Mr. Chief Justice Hughes thus stated the question before the Court in the *Norman* case:

"These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the 'gold clauses' of private contracts for the payment of money." (*Id.*, 291.)

Every word said by him related to the question which he said "touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to 'gold clauses' in existing contracts". (*Id.*, 297.)

The Decision in Anglo-Continental Treuhand, A.G. v. St. Louis Southwestern Railway Co. (81 Fed. 2d 11). Certiorari denied 298 U. S. 655.

The petitioner says that there is a glaring omission from Judge Learned Hand's opinion in that case of any discussion of the second sentence of the enacting clause. We stand upon that opinion. Its cogency and adequacy leave little to be said. So the majority of the Court of Appeals and the dissenting Justices of the Appellate Division thought. So we assume this Court must have thought in denying certiorari in a case involving the construction of a federal statute of such importance with a mass of litigation pending and threatened in both the state and federal courts dependent upon the proper construction of the Act. Judge Hand did not fail to consider the second sentence of the enacting clause, as is charged. He specifically referred to the petitioner's construction of it and said—

> "That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises."

The Evil Aimed At.

The petitioner claims that it is within the class of debtors which the Act was passed to relieve. The Act was not passed to enable debtors to repudiate their contracts. That certainly was beyond the power of the Congress. Certainly there was no intention to relieve debtors owing obligations payable in foreign currencies. It is no worse for the petitioner to perform the promise assumed by it to pay a specified amount of Swiss francs to a creditor who had an option to demand dollars than it is for some other debtor to perform its promise to pay Swiss francs to a

creditor who has no option but to receive Swiss francs. It may be its misfortune that to sell its bonds its predecessor incurred what has turned out to be a hazardous risk. The petitioner assumed that risk after currency devaluations abroad were well on the way, with everything to indicate that that would be to the advantage of American debtors owing obligations payable in foreign currencies. We do not have to go to the dictionary or indulge in inference to know the purpose of the Joint Resolution. The Congress stated it in the Act itself, "To Assure Uniform Value to the Coins and Currencies of the United States" and "to maintain at all times the equal power of every dollar."

The evil aimed at was also stated, *i. e.*, gold obligations under "gold clauses", which because of their magnitude obstructed the power of the Congress to devalue the dollar. The relief of debtors owing gold obligations was incidental, but it is undisputed that there was no thought of relieving debtors owing obligations payable in foreign currencies. The only monetary legislation affecting them was the Thomas Amendment, the Emergency Banking Act, the orders and regulations under it and the Gold Reserve Act. The governing purposes of those Acts were to prevent hoarding and the flight of gold, to raise prices, to protect our foreign commerce from the adverse effects of the depreciation of foreign currencies, to regulate foreign exchange and *to stabilize the exchange value of the dollar.* Whatever effect those Acts might have on debtors and creditors, buyers and sellers was also incidental.

It is quite true that it would require more dollars to buy Swiss francs or any other commodity after devaluation than before, but the dollars would all have equal buying and debt-paying power. It was not the purpose of the Joint Resolution to relieve anyone from the inflationary

results of an Act intended to be inflationary. Its sole purpose was to make all dollar obligations payable in legal tender dollars of equal value.

The Petitioner's Conception of the End to Be Attained by the Joint Resolution.

If the petitioner's conception of the end sought be correct, the Joint Resolution was plainly invalid.

The petitioner assumes that the Congress did not have the few American debtors in mind who chanced to owe Dutch guilders or Swiss francs, but argues that if it had thought of them it would not have excluded them from the class it intended to relieve, especially as devaluation was authorized for their "primary benefit" (Brief, p. 45), and that "One of the broad underlying purposes of the Resolution was to place all obligations payable in money of the United States, whatever their provisions for payment, on a parity" (*Id.*).

Of course the petitioner does not say in so many words that the Resolution was passed for the relief of debtors. That would be too bald.

We say that the Resolution was not passed for the benefit or relief of any individual, group or class, and that if it was it was invalid. No more was the Thomas Amendment passed for the benefit of the petitioner or others such as the petitioner, as is claimed. The latter Act was passed to further its declared purposes to stabilize domestic prices and to protect foreign commerce from the adverse effects of the depreciation of foreign currencies, both of course in the general interest.

The Congress did not concern itself with the consequences to particular individuals, groups or classes. It knew that it would cost Americans more to buy foreign

currencies with which to purchase foreign goods or pay debts payable in such currencies. It doubtless did not consider that serious since the principal currencies of the world were already relatively as low or lower than the contemplated devalued dollar, and the two exceptions were likely to be. Currency depreciation and devaluation were the order of the day and exceptional cases could not be provided for. It knew, of course, for it had been a matter of too much public discussion both in and out of Congress to be overlooked, that the American public had bought billions upon billions of foreign dollar bonds.

The Joint Resolution was passed, if what the Congress said about it is to be accepted, not to relieve debtors, not to put obligations on a parity, but to assure the uniform value of all coins and currencies of the United States and to maintain the equal power of the dollar. Those ends were plainly within its constitutional authority. A dollar, worth only its gold content in paying power in the discharge of gold obligations, and a hundred cents in the discharge of other obligations, would, with seventy-five to a hundred billions of gold dollar obligations outstanding, result in a very substantial degree in a dual monetary system, gold value dollars in effect for one purpose, legal tender dollars for another. That would seriously dislocate our domestic economy in a great variety of ways. It was the declared purpose and policy of the Congress to prevent that by the exercise of its power over the monetary system of the country, let the consequences be what they might to individuals, groups or classes. Of course it was believed that that would promote the general good, though necessarily there would be many variations in the consequential benefits and burdens. It happens that the Swiss franc and

the Dutch guilder are relatively somewhat higher than the dollar, but no one knows where they may be a month from now. Of course the Congress could not guard against, or take measures to protect anyone from the consequences of, such variations.

In the last analysis the petitioner's contention really comes to this: The Joint Resolution and the Thomas Amendment as well were really passed for ulterior ends. Those stated by the Congress were not the true ends. If that view be accepted, both were unconstitutional.

This Court divided in the *Norman* and companion cases, not on the power of the Congress over the monetary system of the country, but on the question whether the ends stated by the Congress were the true ends sought to be attained by the challenged legislation.

Mr. Justice McReynolds thus stated the position of the minority:

> "The fundamental problem now presented is whether recent statutes passed by Congress in respect of money and credits, were designed to attain a legitimate end. Or whether, under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts and drive into the Treasury all gold within the country, in exchange for inconvertible promises to pay, of much less value.
>
> "Considering all the circumstances, we must conclude they show that the plan disclosed is of the latter description and its enforcement would deprive the parties before us of their rights under the Constitution" (294 U. S. 369-370).

Mr. Chief Justice Hughes thus summarized the views of the majority:

> "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority" (*Id.*, 316).

Ironically enough, the petitioner supports the view of the minority as to the purpose of the Act and on that view wants to extend it to a case which we submit is not even within its letter and most certainly is not within its intent, construed according to its natural and plain meaning.

POINT III.

Upon the petitioner's construction, the Joint Resolution violates the Fifth Amendment of the Constitution of the United States for (a) abrogating contract rights which did not obstruct the intended exercise of power by the Congress, and (b) arbitrarily discriminating between creditors in the same class.

(A) The Congress did not determine that obligations payable by Americans in the currencies of other countries obstructed its power to regulate the value of the money of the United States, or that they were inconsistent with its declared purpose to maintain the equal power of the dollar.

(B) Upon the petitioner's construction the Resolution obviously discriminates—we say arbitrarily—between obligations which give obligees the right to require payment in foreign currencies and nothing else and those which give obligees the right to require payment in foreign currencies with an option to demand dollars,—between obligations in terms payable only in a foreign currency and those so made payable by the exercise of an undoubted contract right.

The above propositions involve direct effects of the Act, not indirect effects upon particular individuals, groups or classes, necessarily as variable as the special circumstances controlling them. We assume that the Act was passed for the purposes stated by the Congress in the exercise of its power over the monetary system of the country, neither to favor, to burden or to relieve any group or class, creditors or debtors, buyers or sellers. We also assume that if obligations payable in foreign currencies, either absolutely or upon the lawful choice of the obligees, were in fact an obstruction to the power of the Congress, although it did not so find—a cogent reason for thinking otherwise—and if there was any reasonable basis for discriminating between such obligations merely because the holder of one had a dollar option and the holder of another did not, the validity of the Act, even as construed by the petitioner, would be settled by the decision of this Court in the *Norman* case.

Our position is that there is no basis for finding either of the facts, both of which are necessary to sustain the Act upon that construction, and neither of which was found by the Congress, although it was careful to express the determination of fact on which it based its enactment.

An argument has been made, but not by the petitioner, that unless obligations payable in foreign currencies are within the Joint Resolution, it arbitrarily discriminates between creditors to whom gold obligations are owing and those to whom foreign currency obligations are owing. If that be so, the Resolution is unconstitutional, because concededly it does not cover obligations payable in foreign currencies, unless the obligees also have dollar options, which they have rejected.

The argument is made that alternative foreign currency provisions are the equivalent of the "gold clause" provision, because intended to give the obligees the right to demand the most advantageous currency at the time of the demand and thus to give them an additional assurance of receiving gold coin value. Undoubtedly the intent was to give holders, wherever they might be, the right to demand the most advantageous currency at the time of payment. The issuer thought that would enable it to sell its bonds to the best advantage. The other conclusion is a *non-sequitur*.

The promise to pay in gold coin of the United States obviously was not fortified in the slightest degree, as far as gold payments were concerned, by alternative promises to pay at the option of the holder specified amounts of foreign currencies without any reference whatsoever to gold. The different currencies named were on a gold basis at the time of the promise and had they remained so, convenience might have been the chief consideration in determining the election of the holder. But the promise to pay specified amounts of foreign currencies was not tied to gold or gold value in any way, and did not give any additional assurance to holders of receiving gold coin value, as would a promise

to pay a stated number of dollars in gold or the equivalent in either of the currencies named.

No one knew in 1910 what changes might occur in the monetary conditions of the world or in any of the countries whose currencies were involved, even including the United States. To make its bonds more saleable, the issuer decided to take the risk of whatever changes might occur. No doubt it did not anticipate the World War or the dislocations consequent upon it. But the law can take no account of that. The issuer did not take the risk of the gold value of the foreign currencies named. It gave holders the option to require payment in dollars in gold *or* in *specified* amounts of six foreign currencies regardless of their gold value or dollar value, no matter what might happen. It so happens that the United States has abrogated the promise to pay dollars in gold and that all the other currencies have depreciated in varying amounts below their gold value at the time of the promise. That risk was on the holders. None the less, and even for greater reason, in that situation they have the right to choose the currency most advantageous to them, for the contract in plain and unambiguous terms gave them that right, and it is of no consequence whether the issuer anticipated all that has occurred. It assumed all of the risks involved in its promise which it failed to guard against, but it did not assume any risks of the gold value of the foreign currencies that holders were given the right to choose.

As events have fallen out, holders of multiple currency bonds have been denied the option to require payment in the specified number of gold dollars in common with everyone else who had contract rights to require payment in gold dollars. That risk again was on the holder, not on the

obligor—all the more reason for not denying the holders the rights which survive the abrogation of "gold clauses".

As matters stand, the respondent might, after the passage of the Joint Resolution, have required payment of 25 legal tender dollars on each coupon, or of either of the specified amounts of pounds, guilders, reichsmarks, or French, Belgian or Swiss francs, and the relative value of those currencies either to each other or in relation to gold is of no consequence whatever, except as that might influence the choice precisely as was intended when the promise was made. In the last analysis the petitioner's contention rests upon the proposition that, if the original promise had been one to pay at the option of the promisee 25 legal tender dollars or 129.50 Swiss francs, the respondent would have to accept $25.

The respondent has chosen to be paid 129.50 Swiss francs on each coupon. The alternative promises have been obliterated.

We maintain that if the Joint Resolution nullified the respondent's contract right of election it is an unlawful invasion of a vested contract right and an arbitrary discrimination between an obligation that has become absolute by the exercise of a contract right of choice and precisely the same kind of obligation which afforded the obligee no choice, and that the exercise of those rights will not interfere in the slightest degree with the maintenance of a uniform monetary system in the United States.

It is unnecessary to labor the point further, since the Resolution is plainly susceptible of a construction which avoids it.

See—

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298, 307;

Panama R. R. Co. v. *Johnson*, 264 U. S. 375, 390;

Missouri Pacific Railroad Co. v. *Boone*, 270 U. S. 466, 471-2;

Blodgett v. *Holden*, 275 U. S. 142, 148;

Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331, 346.

Conclusion.

The judgment below should be affirmed.

February 6, 1939.

Respectfully submitted,

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Counsel for Respondent.

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Supreme Court U. S.
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APR 24 1939
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner,

—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

MOTION OF ARTHUR B. WEISS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

ARTHUR B. WEISS,
No. 1115 Main Street,
Bridgeport, Connecticut.

ABRAHAM L. POMERANTZ,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner,

—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

Motion for Leave to File Brief as *Amicus Curiae*.

May It Please the Court:

Upon the annexed consent of all parties hereto, the undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

ARTHUR B. WEISS,
No. 1115 Main Street,
Bridgeport, Connecticut.

Consent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner.

—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

IT IS HEREBY CONSENTED that Arthur B. Weiss, Esq., of 1115 Main Street, Bridgeport, Connecticut, may file and serve herein a brief as *amicus curiae*.

Dated, New York, April 19, 1939.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 590.

BETHLEHEM STEEL COMPANY,

Petitioner,

—against—

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED,

Respondent.

BRIEF OF ARTHUR B. WEISS, AS AMICUS CURIAE.

Statement.

The reason for filing this brief is that the undersigned is attorney for "Credimus" Maatschappij tot Deelneming in Industrieele Bedrijven N. V., a Dutch corporation. Said "Credimus" is the owner and holder of certain bonds and interest coupons known as the San Francisco Terminal bonds and coupons of the Southern Pacific Company, a Kentucky corporation. Such bonds and interest coupons contain multiple currency clauses substantially similar to those involved in the present case.

The interest coupons in suit (R. 12) confer upon the holder a two-fold option. The holder may not only elect the *currency* of payment. In addition to and coupled with such option, he may also elect the *place* of payment. Under the terms of the bonds and

coupons, the defendant is under a duty to make payment, at the option of the holder, in New York, London, Frankfort o/M, Amsterdam, Brussels, Basel or Zurich. The plaintiff presented its coupons for payment at the designated paying office in Zurich, Switzerland. Zurich became thereby the place of performance of the coupons in suit.

We shall refrain from repeating the factual details which are adequately stated in the briefs of the parties. This brief will be confined to the question of law: whether the performance of defendant's promise to pay, at the option of the couponholders, a designated amount of Swiss Francs in Switzerland was excused by the enactment of Public Resolution No. 10, 73d Congress, of June 5, 1933 (48 Stat. at L. 112) (hereinafter referred to as the "Joint Resolution").

It is our contention that the Joint Resolution does not affect the multiple currency clauses here involved for two separate and independent reasons:

1. The Joint Resolution outlaws only *gold* clauses; it does not affect obligations to make payment *in a foreign currency.*

2. The Joint Resolution outlaws only gold obligations payable *within the United States;* it does not affect obligations to make payments (whether in gold or otherwise) which are due *in a foreign country.*

The first of these propositions has been amply argued by the respondent. This brief will, therefore, deal only with the second proposition, *i. e., that the Joint Resolution has no extra-territorial force.*

Outline of Argument.

The purpose and policy of the Joint Resolution must be ascertained by considering it against the background of the legislative measures preceding it (*Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, at 295, 297). The law in effect immediately before the enactment of the Joint Resolution excused only gold payments *due within the United States;* it did not excuse the obligations of American citizens to make gold payments *due in a foreign country.* The Joint Resolution purported merely to confirm and to clarify this state of the law, not to change it; this intent of Congress is proved by ample evidence. The Joint Resolution does not, therefore, apply to payments (in gold or otherwise) which are due in a foreign country. This territorial limitation of the Joint Resolution is justified by the very reasons of policy which led to its enactment. Moreover, it is in accordance with recognized rules of international law which Congress presumably did not intend to disregard. If promises to pay gold abroad are valid, it follows, *a fortiori*, that promises to pay sums of foreign currency in a foreign country are equally valid. Finally, a promise to pay gold or foreign currency abroad is not vitiated by the mere fact that it is contained in an alternative contract under the terms of which the creditor might also, at his option, demand gold payment in the United States.

POINT I.

The law in effect immediately before the enactment of the Joint Resolution excused only gold payments due within the United States, but not those due in a foreign country.

The previous enactments shedding light upon the purpose and construction of the Joint Resolution are summarized in *Norman* v. *Baltimore & O. R. Co., supra,* at pages 295-297. These enactments, here pertinent, were the Emergency Banking Act of Congress of March 9, 1933 (48 Stat. at L. 1, chap. 1; 12 U. S. C. §95a) and the Executive Orders of the President of March 10, 1933 (No. 6073), of April 5, 1933 (No. 6102) and of April 20, 1933 (No. 6111). Briefly, they prohibited the hoarding, and required the delivery to the government, of gold coin, gold bullion and gold certificates *"within the continental United States"*; and they prohibited the export of gold coin, gold bullion and gold certificates *"from the United States."*

Under these provisions, it was obviously lawful and proper for an American citizen to acquire, to sell and to dispose of gold coin, gold bullion or gold certificates *situated in a foreign country.* Thus it was altogether lawful for an American citizen to purchase gold abroad, to keep it abroad, and to use it for the payment of his foreign gold debts. In fact, the right of American citizens to hold gold abroad has been expressly recognized by the Department of Justice.

> Opinion of the Attorney General of May 25, 1933, 37 Op. Att'y Gen'l 155.

What, then, was the effect of this legislation, preceding the Joint Resolution, upon debts previously contracted and payable in gold?

Clearly, gold debts *payable in the United States* had become impossible of performance. Nobody could lawfully acquire, hold or retain gold within the United States; and the Treasury had declared that "gold is not now paid, nor is it available for payment, upon public or private debts" (Treasury Statement of May 26, 1933, quoted in *Norman* v. *Baltimore & O. R. Co.*, *supra*, at p. 314). Consequently, gold debtors were excused from their duty to make gold payments *within the United States* (6 Williston on Contracts, rev. ed. 1938, pp. 5425, *et seq.*; *Irving Trust Company, etc.* v. *Hazlewood, etc.*, 148 Misc. 456, 265 N. Y. Supp. 57, [Sup. Ct., New York County, decision of May 24th, 1933]).

Not so gold debts *payable abroad*. Gold was abundantly available in foreign countries. Foreign gold was expressly exempted from the operation of the Executive Orders. An American citizen holding gold abroad was fully privileged to retain it, sell it, give it away, or to apply it to the payment of his foreign gold debts. If he owned no gold, he was at liberty to purchase it in the foreign markets and to use it for the payment of such of his gold debts as were payable abroad. The gold legislation preceding the Joint Resolution was, therefore, no obstacle to the payment abroad of gold debts due in foreign countries. Such payment, being neither impossible nor illegal, was therefore enforceable in our courts.

POINT II.

The Joint Resolution merely purported to confirm and to clarify this state of the law, not to change it.

This is made abundantly clear by the reports of the Senate and House Committees relative to the adoption of the Joint Resolution. These reports have been recognized by this Court as an important source for determining the policy and construction of the Joint Resolution (*Norman* v. *Baltimore & O. R. Co., supra,* at pp. 311, 312, 314).

The Senate Committee on Banking and Currency, in its Report of May 27, 1933 (Sen. Rep. No. 99, 73d Cong., 1st Sess.), stated:

> "Certain *questions of interpretation* have arisen with respect to the legislation empowering the President to prevent the withdrawal and hoarding of gold, and the provision in the Thomas amendment making all coins and currencies legal tender for all debts. Additional and immediate legislation is necessary to remove the disturbing effect of this *uncertainty* and to insure the success of the policy by closing possible legal loopholes and removing inconsistencies.
>
> * * * * * * *
>
> "It is of the utmost importance that legislation along the lines of that suggested in the Joint Resolution be enacted because:
>
> "(a) *It completely regularizes the present de facto situation as to both public and private debts.*

"(b) (Relates to a prospective offering of Treasury obligations.)

"(c) *It would greatly facilitate administration of the laws against hoarding.*

"(d) *It would eliminate an existing uncertainty in business.*

"(e) It places old 'gold clause' and new 'legal tender' obligations on the same footing in respect of payment.

"(f) It would make certain of accomplishment the declared policy of Congress." (Italics supplied.)

Similarly it was said by the Committee on Banking and Currency of the House of Representatives (H. R. Rep. No. 169, 73d Cong., 1st Sess.):

> *"This legislation is complementary to the steps already taken under the Emergency Banking Act* to protect the monetary system and is essential for the accomplishment of material recovery." (Italics supplied.)

The Joint Resolution thus purports to clarify "*questions of interpretation*" and "*uncertainty*" with respect to the previous gold legislation. But so far as the gold situated outside the United States was concerned, there existed no "uncertainty" and no "question of interpretation"; for the President's Executive Orders were by their express terms restricted to gold "*within the continental United States*". Congress naturally knew this territorial limitation. Had it been the intention of Congress to eliminate the limitation, Congress would have said so. But then the

Joint Resolution could not have been characterized as legislation only *"complementary to the steps already taken"*, purporting merely to *"regularize the present de facto situation as to both public and private debts"*. Language such as this allows of no conclusion other than that Congress, in enacting the Joint Resolution, still had no intention to interfere with the acquisition, holding and disposal, by citizens of the United States, of gold situated abroad and with the use of such gold for the payment of gold debts due abroad. The consequence is inevitable that even under the Joint Resolution the performance of gold obligations payable in foreign countries continues to be possible, legal and enforceable.

POINT III.

The territorial limitation of the Joint Resolution is justified by the very reasons of policy which led to its enactment.

The evils to be averted by the Joint Resolution are succinctly described in *Norman* v. *Baltimore & O. R. Co., supra,* at page 315. The devaluation of the dollar placed the domestic economy on a new basis. Public and private corporations would continue to receive payment for their services in the existing currency; yet their outstanding gold bonds would call for an amount of currency determined by the former gold standard. Thus, in terms of dollars, the income of the gold bond debtors would remain the same as before, while their debt burden would be considerably increased. To balance this "dislocation of the domestic economy", the Joint Resolution was enacted and gold clauses were abolished.

It is an outstanding feature of this reasoning that the dollar, despite its descent from the gold standard, was to retain its previous domestic purchasing power. For a decline of the domestic purchasing power of the dollar would have been tantamount to an increase of the domestic price level; and increased prices for their services would have compensated the gold debtors for an increased gold debt burden. The gold clauses could cause a "dislocation of the domestic economy" only if all other prices (except the price of gold) remained stable.

On the other hand, it was only the stability of the domestic purchasing power of the dollar, that protected the bondholders from suffering detriment and injustice through the Joint Resolution. Indeed, so long as the domestic purchasing power of the dollar remained the same, the gold clause was academic and unnecessary. The bondholder who has paid $1,000 for his bond and is repaid the same amount, has no ground for complaint. Quite properly was it said, therefore, in Congress:

> "From a material point of view the obligee suffers no damage if what he receives is of equal value with what he claims. At the present time, all currency and coins, including gold coins, are equal in purchasing power within the United States. * * * Therefore, the Joint Resolution, in fact, does not subject the obligee to any material damage, and he cannot claim to have suffered any deprivation of property unless and until he can show some material damage. * * *" (p. 4893).
>
> "We are not depriving anybody of any property or of any value or of any rights they now

have, except that we are not proposing to pay in gold absolutely the obligations, but we are giving what is equal to gold, what is as good as gold, and no one can claim that he has lost anything by this kind of transfer" (p. 4890).

(Statement of Senator Fletcher, Congressional Record, Vol. 77, Part 5, pp. 4889, 4890.)

However, dollar payments due in a foreign country are on a different level. The domestic purchasing power of the dollar is of no account at the foreign place of payment. There the value of the dollar is determined exclusively by its relation to the local currency, and, of course, the value of the dollar, as compared with the foreign local currency, has been considerably reduced. While, in the case of domestic payments, the gold clause abrogation was comparatively innocuous because of the stability of the domestic purchasing power of the dollar, no such redeeming feature existed with respect to foreign payments. The creditor of a gold bond who was entitled to receive payment abroad, would be deprived, by the gold clause abrogation, of 40% of the value of his claim.

Obviously, Congress did not intend such a result. Congress, as has been shown, was anxious not to deprive bond creditors of their property and not to inflict detriment upon them. Detriment indeed was avoided in the case of domestic payments; but it would have been inevitable, had the Joint Resolution been extended to foreign payments. The very policy of the Joint Resolution fortifies, therefore, the conclusion that it was to have merely territorial operation.

POINT IV.

The territorial limitation of the Joint Resolution to gold debts payable in the United States is in accordance with recognized principles of the conflict of laws.

The attitude of the United States government is indicative of the purpose and policy of the Joint Resolution and deserves, therefore, special consideration. Reference is made to the

> Opinion of the Attorney General of August 22, 1933, 37 Op. Att'y Gen'l 250.

It was held therein that the Joint Resolution has no extra-territorial force and that, where a gold contract was made and was to be performed abroad, the American gold debtor was still under the duty of making the gold payment in the foreign country as provided in the contract.

Indeed, it is firmly embedded in our jurisprudence that the performance of contracts and excuses for non-performance are governed by the laws of the place of performance.

> *Zimmermann* v. *Sutherland*, 274 U. S. 253;
> *Central Hanover Bank & Trust Co.* v. *Siemens & Halske A. G.*, 15 Fed. Supp. 927, aff'd on op. below, 84 Fed. (2d) 993, cert. den. 299 U. S. 585;
> Restatement of the Law of Conflict of Laws (1932) Secs. 358, 360.

Legislation abrogating gold clauses and similar provisions do not, therefore, affect payments due in foreign countries.

Anglo-Continentale Treuhand A. G. v. *St. Louis Southwestern Railway Co.*, 81 Fed. (2d) 11, cert. den. 298 U. S. 655, *sub nom. Henwood* v. *Anglo-Continentale Treuhand A. G.*;

Pan American Securities Corporation v. *Fried. Krupp A. G.*, 169 Misc. 445, 6 N. Y. Supp. (2d) 993, aff'd App. Div. 10 N. Y. Supp. (2) 205.

Congress must be deemed to be familiar with this rule. Its failure to make contrary provision would seem to be conclusive evidence of the Congressional intent to limit the Joint Resolution to the territory of the United States.

The defendant, while paying lip service to the principle of territoriality, seeks to emaciate it. Foreign courts, defendant concedes, are not bound by the Joint Resolution; but any one resorting to an American court is said to be subject to the mandate of the Resolution (Petitioner's Main Brief, p. 29). However, the rule of territoriality is not only meant for foreign courts. Our own courts refuse to apply our law where application would amount to giving it extra-territorial operation. Thus a combination in restraint of trade, entered into in a foreign country by American citizens, was held not to violate the Sherman Act of July 2, 1890; for even though the Act was not in terms confined to the United States, it was held to have merely territorial operation (*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347). The so-called "Seaman's Act" of Congress, prohibiting the advance payment of seamen's wages, was held to be territorial and therefore not to outlaw advance

payments of wages made in England (*Sandberg* v. *McDonald*, 248 U. S. 185). Similarly our courts should not give extra-territorial effect to the Joint Resolution by applying it to payments due in a foreign country.

If a promise to pay gold in a foreign country is not within the ban of the Joint Resolution, it follows, *a fortiori*, that a promise to pay a sum of foreign currency in a foreign country is equally exempt from the Resolution.

POINT V.

A promise to pay a sum in foreign currency abroad, valid in and by itself, is not vitiated by the fact that it is contained in an alternative contract, by the terms of which the creditor might also, at his option, demand a gold payment in the United States.

The origin of the Joint Resolution and its declared policy, court decisions and rulings of administrative agencies, all demonstrate that a promise by an American citizen to pay gold or a sum of foreign currency in a foreign country is not affected by the Joint Resolution. Can it be said that such a promise, innocuous in itself, is vitiated by the fact that it is coupled with an alternative promise to make a gold payment in the United States?

The defendant contends for such a vitiating effect. It does so despite the rule that the supervening impossibility or illegality of one alternative branch of a contract does not discharge the other alternative duty (*Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, at 358; 6 Williston, *op. cit. supra*, pp. 5304 *et seq.*).

Defendant's argument is based on the second sentence of clause (a) of the Joint Resolution, providing in effect, that every "obligation" payable in American money, whether or not containing a gold clause, shall be discharged upon payment, dollar for dollar, of its face amount. Each of defendant's coupons, although containing a number of alternative promises, is said to be *one* "obligation". And since one of the alternative promises contained therein calls for the payment of gold dollars, the whole "obligation" is "payable in money of the United States". The coupon, *i. e.*, the "obligation", may therefore, according to defendant, be discharged by the payment of its dollar face amount, and the other alternative promises must be completely disregarded.

Nothing is to be gained by quibbling about the abstract meaning of the word "obligation". Only the contextual meaning and the purpose and policy of the Joint Resolution are of account. The Resolution outlaws promises to pay gold dollars in the United States; such promises may be discharged by payment, dollar for dollar. But the Resolution does not affect promises to pay gold or foreign exchange in a foreign country. If a promise to pay gold dollars in the United States and a promise to pay a sum of foreign currency in a foreign country are alternatively combined in one contract, the purpose and policy of the Joint Resolution are satisfied by striking down the gold payment due in the United States. But we see no conceivable reason why destruction should be extended to the innocuous promise of paying foreign currency in the foreign country. If this promise, standing alone, is beyond the ban of the policy of the Joint Resolution, it is no less compatible with our

public policy if coupled with an alternative dollar promise.

Defendant's theory, it is submitted, would lead to preposterous consequences. Let the crucial sentence of the Joint Resolution, and the construction given it by the defendant, be more closely scrutinized. Taking its essential content, as understood by the defendant, this sentence says:

> "EVERY OBLIGATION PAYABLE IN MONEY OF THE UNITED STATES, WHETHER OR NOT A GOLD CLAUSE IS CONTAINED THEREIN, SHALL BE DISCHARGED UPON PAYMENT, DOLLAR FOR DOLLAR, IN LEGAL TENDER." (See also the sentence, as paraphrased in Defendant's Main Brief, p. 19.)

It is important to note that the "obligation payable in money of the United States", referred to in this sentence, need *not* be a *gold* dollar obligation; it may also be, for instance, a silver dollar obligation, or just a plain dollar obligation.

With this sentence in mind, defendant proceeds to argue that every contract containing alternative promises is an entire "obligation"; and if only one of the alternative promises contained therein calls for the payment of dollars (gold dollars, or silver dollars, or just plain dollars), the whole "obligation" is "payable in money of the United States" and may therefore be discharged by payment, dollar for dollar, the other alternative promises being completely disregarded and nullified.

What is the effect of this theory upon everyday types of alternative contracts? Let it be assumed that one party promises, for a consideration, either to

convey Blackacre to the other party or to pay him, at his option, a sum in dollars (it makes no difference whether they are gold dollars, silver dollars, or just plain dollars). According to defendant's theory, the transaction would fall under the ban of the Joint Resolution. For the contract, although consisting of two alternative promises, constitutes one entire "obligation". And one of the alternative promises calls for the payment of money of the United States. The whole "obligation" can therefore, according to defendant's theory, be discharged by payment, dollar for dollar, and the buyer of the option cannot demand the conveyance to him of the land which he bargained for. In short, defendant's construction of the Joint Resolution would make it impossible for businessmen to enter into any kind of alternative contracts, in which one of the alternative promises calls for a dollar payment.

Needless to say, the Joint Resolution was never intended to operate in such a manner upon alternative contracts. The manner in which the Resolution does operate upon the coupons in suit is clear and simple. If the creditor demands payment in the United States, the gold clause will be disregarded and the coupon will be paid, dollar for dollar in legal tender. If the creditor demands payment in Switzerland, the coupon is payable in Swiss Francs and will be discharged by payment, Franc for Franc. Such is exactly the payment which the plaintiff herein demands. Quite appropriately was it therefore said by the Court below (R., 71):

> "The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency."

The Circuit Court of Appeals for the 8th Circuit has sought to minimize that election (*Guaranty Trust Co. v. Henwood*, 98 Fed. (2) 160, 165, cert. granted, 59 S. Ct. 146). The demand for payment in the foreign country is "known to be futile"; the exercise of the option is termed as "running around an international stump"; the bondholder is said to attempt to enrich himself at the expense of the debtor; and that result would be reached "with further saving of exchange charges" "by a simple mathmetical calculation".

It is hard to conceive how these arguments bear upon the applicability of the Joint Resolution. If a contract gives the creditor an option, there must be some method of exercising it. The debtor cannot nullify the option by declaring in advance that he will default and that therefore the demand for payment abroad is "known to be futile". The "saving of exchange charges" upon the exercise of the option is hardly an argument to show that no option may be exercised at all. The simile of an "international stump" is a mere figure of speech. And a creditor who receives the contractual payment at the contractual place in the currency thereof, can hardly be said to enrich himself at the expense of the debtor.

It is submitted that by virtue of plaintiff's demand, the bonds in suit are payable in Zurich, Switzerland; under the laws of Switzerland, the defendant is under the duty of paying the amount of Swiss Francs indicated in the coupons. The Joint Resolution of Congress does not purport to effect that duty.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

ARTHUR B. WEISS.
as Amicus Curiae,
No. 1115 Main Street,
Bridgeport, Connecticut

ABRAHAM L. POMERANTZ.
Of Counsel.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 591

BETHLEHEM STEEL COMPANY, PETITIONER,

vs.

ANGLO-CONTINENTALE TREUHAND, A. G., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JANUARY 13, 1939.

CERTIORARI GRANTED JANUARY 16, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 591

BETHLEHEM STEEL COMPANY, PETITIONER,

vs.

ANGLO-CONTINENTALE TREUHAND, A. G., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein Corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands Corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein Corporation, and Hydropress Handels, A. G., a Liechtenstein Corporation, Plaintiffs-Respondents,

against

BETHLEHEM STEEL COMPANY, Defendant-Appellant

STATEMENT UNDER RULE 234

This action was commenced October 8, 1936 by acceptance of service of a copy of summons and complaint. Issue was joined January 27, 1937 by the service of an amended answer to the amended complaint.

Plaintiffs-Respondents appeared by Harry Hoffman, Esq., as their attorney.

Defendant-Appellant appeared by Messrs. Cravath, deGersdorff, Swaine & Wood, as its attorneys.

There has been no change of parties or attorneys.

[fol. 2] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

Index No. 32424—1936

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein Corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands Corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein Corporation, and Hydropress Handels, A. G., a Liechtenstein Corporation, Plaintiffs,

against

BETHLEHEM STEEL COMPANY, Defendant-Appellant

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that defendant hereby appeals to the Appellate Division of the Supreme Court, First Judicial

Department, from the judgment entered herein against defendant in the office of the Clerk of the County of New York on October 30, 1937, in favor of plaintiff Anglo-Continentale Treuhand, A. G. for the sum of $19,245.48, in favor of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) for the sum of $18,898.70, in favor of plaintiff Mondiale Handels-und Verwaltungs, A. G. [fol. 3] for the sum of $13,579.81, and in favor of plaintiff Hydropress Handels, A. G. for the sum of $465.85 and for costs in favor of said plaintiffs, and from the order upon which said judgment is based made herein by Mr. Justice Samuel H. Hofstadter on October 25, 1937, and entered in the office of said Clerk on October 26, 1937, which order struck out the amended answer of defendant and directed that judgment be entered in favor of the plaintiffs.

Dated November 26, 1937.

Yours, etc., Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, No. 15 Broad Street, New York, N. Y.

To Clerk of the County of New York. Harry Hoffman, Esq., Attorney for Plaintiffs, No. 30 Pine Street, New York, N. Y.

[fol. 4] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

Index No. 32424—1936

JUDGMENT APPEALED FROM

The plaintiffs herein having made a motion for an order striking out the answer of the defendant herein and directing that judgment be entered herein, in favor of the plaintiffs, under Rules 113 and 114 of the Rules of Civil Practice, on the ground that there is no defense to the action,

And said motion having duly come on to be heard at a Special Term, Part I, of this Court, held in and for the County of New York, at the County Courthouse in the Borough of Manhattan, City of New York, on the 10th day of September, 1937, and Harry Hoffman, attorney for the plaintiffs, having appeared in support of said motion, and Cravath, de Gersdorff, Swaine & Wood, attorneys for defendant (William D. Whitney, Esq., of counsel) having

appeared in opposition thereto, and the Court having duly made an order, dated October 25, 1937 and entered and filed in the office of the Clerk of the County of New York on October 26, 1937, granting said motion and directing that judgment be entered herein in favor of the plaintiff Anglo-Continentale Treuhand, A. G. in the sum of $17,721.39, with interest on $7,472.28 thereof from the 17th day of April, 1936, with interest on $9,795.55 thereof from the 2nd day of July, 1936, and with interest on $453.56 thereof from [fol. 5] the 20th day of July, 1936; and in favor of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) in the sum of $16,519.50, with interest on $421.23 thereof from the 26th day of February, 1935, with interest on $13,942.78 thereof from the 18th day of June, 1935, and with interest on $2,155.49 thereof from the 9th day of July, 1935; and in favor of plaintiff Mondiale Handels and Verwaltungs, A. G. in the sum of $12,265.08, with interest on $4,538.04 thereof from the 18th day of June, 1935, with interest on $2,731.23 thereof from the 1st day of April, 1936, and with interest on $4,995.81 thereof from the 9th day of July, 1936; and in favor of plaintiff Hydropress Handels, A. G. in the sum of $432.21, with interest thereon from the 20th day of July, 1936, together with the costs and disbursements of this action,

Now, on motion of Harry Hoffman, attorney for the plaintiffs, it is

Adjudged that the plaintiff Anglo-Continentale Treuhand, A. G. of Liechtenstein, Europe, do recover of the defendant Bethlehem Steel Company of 25 Broadway, N. Y. City, N. Y., the sum of $19,245.48, and that said plaintiff Anglo-Continentale Treuhand, A. G. have execution therefor; and it is

Further adjudged that the plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) of Rotterdam, The Netherlands, Europe, do recover of the defendant Bethlehem Steel Company of 25 Broadway, N. Y. City, N. Y., the sum of $18,898.70, and that said plaintiff [fol. 6] Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) have execution therefor; and it is

Further adjudged that the plaintiff Mondiale Handels- und Verwaltungs, A. G. of Liechtenstein, Europe, do recover of the defendant Bethlehem Steel Company of 25

Broadway, N. Y. City, N. Y., the sum of $13,579.81, and that said plaintiff Mondiale Handels-und Verwaltungs, A. G. have execution therefor; and it is

Further adjudged that the plaintiff Hydropress Handels, A. G. of Liechtenstein, Europe, do recover of the defendant Bethlehem Steel Company of 25 Broadway, N. Y. City, N. Y., the sum of $465.85, and that said plaintiff Hydropress Handels, A. G. have execution therefor; and it is

Further adjudged that the plaintiffs, Anglo-Continentale Treuhand, A. G., Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), Mondiale Handels- und Verwaltungs, A. G. and Hydropress Handels, A. G., do recover of the defendant Bethlehem Steel Company the costs and disbursements herein, amounting to the sum of $32.65, and that said plaintiffs, Anglo-Continentale Treuhand, A. G., Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), Mondiale Handels- und Verwaltungs and Hydropress Handels, A. G., have execution therefor.

Dated October 30, 1937.

Albert Marinelli, Clerk. (Seal.)

[fol. 7] In Supreme Court of New York, County of New York

Order Appealed From—October 25, 1937

The plaintiffs in the above-entitled action having made a motion for an order awarding summary judgment in favor of the plaintiffs and against the defendant und[illegible] Rules 113 and 114 of the Rules of Civil Practice on th[illegible]round that there is no defense to the action, and for such other and further relief as to this Court might seem just and proper, and said motion having been duly referred by the Justice presiding at Special Term, Part III, of this Court, and having duly come on to be heard at this Special Term, Part I, of said Court on the 10th day of September, 1937.

And it appearing upon the hearing of this motion that since the motion was made the parties have entered into a certain stipulation and agreement dated July 30, 1937, filed herein, pursuant to which the plaintiffs have deposited their coupons (together with United States Treasury Department ownership certificates, Form 1001), with the Treasurer of

[fol. 8] Bethlehem Steel Corporation in New York, and which said stipulation provides, among other things, that the coupons shall be held in escrow in accordance with the provisions thereof and that the respective plaintiffs shall not be required hereafter to produce, present or surrender any of said coupons otherwise than in accordance with said stipulation and agreement,

Now, on reading and filing the amended complaint and the amended answer herein, the notice of motion dated May 17, 1937, the affidavit of Arpad Plesch, sworn to May 17, 1937, with all exhibits thereto annexed, the affidavit of Victor Osias, sworn to September 9, 1937, the affidavit of George L. LeBlanc, sworn to September 9, 1937, the affidavit of Charles J. McKenna, sworn to September 9, 1937, the affidavit of Edwin R. Williams, sworn to September 9, 1937, the affidavit of Cleveland Cobb, sworn to September 8, 1937, and the affidavit of Harry Hoffman, with exhibits thereto annexed, sworn to September 8, 1937, all in support of said motion; and on reading and filing the affidavit of William J. Brown, with all exhibits thereto annexed, sworn to May 22, 1937, and the affidavit of Donald E. Fobes, sworn to May 22, 1937, all in opposition to said motion; and on reading and filing the aforesaid stipulation and agreement dated July 30, 1937; and upon all the papers and proceedings heretofore had herein, and after hearing Harry Hoffman, Esq., attorney for the plaintiffs, in support of said motion, and William D. Whitney, Esq., of counsel for the defendant, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the Court, it is, on motion of Harry Hoffman, attorney for the plaintiffs,

[fol. 9] Ordered that the said motion be and the same hereby is in all respects granted; and it is

Further ordered that the amended answer be and the same hereby is stricken out, and that judgment be entered herein as follows:

1. In favor of the plaintiff Anglo-Continentale Treuhand, A. G. in the sum of $17,721.39, with interest on $7,472.28 thereof from the 17th day of April, 1936, with interest on $9,795.55 thereof from the 2nd day of July, 1936, and with interest on $453.56 thereof from the 20th day of July, 1936;

2. In favor of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) in the sum of $16,519.50, with interest on $421.23 thereof from the 26th

day of February, 1935, with interest on $13,942.78 thereof from the 18th day of June, 1935, and with interest on $2,155.49 thereof from the 9th day of July, 1935;

3. In favor of plaintiff Mondiale Handelsund Verwaltungs, A. G. in the sum of $12,265.08, with interest on $4,538.04 thereof from the 18th day of June, 1935, with interest on $2,731.23 thereof from the 1st day of April, 1936, and with interest on $4,995.81 thereof from the 9th day of July, 1936;

4. In favor of plaintiff Hydropress Handels, A. G. in the sum of $432.21, with interest thereon from the 20th day of July, 1936.

together with costs and disbursements of the action, and it is [fol. 10] Further ordered that, pursuant to Section 614 of the Civil Practice Act, execution on the judgment to be entered herein be, and hereby is, stayed for thirty days after the service upon the attorneys for the defendant of a copy of such judgment and notice of the entry thereof.

Enter.

S. H. H., J. S. C.

In Supreme Court of New York, County of New York

Index No. 32424—1936

Notice of Motion for Judgment

Sirs:

Please take notice, that upon the amended complaint and amended answer herein, and upon the affidavit of Arpad Plesch, sworn to the 17th day of May, 1937, the plaintiffs will move this Court, at a Special Term, Part III thereof, to be held in and for the County of New York, at the County Court House in the Borough of Manhattan, City, County [fol. 11] and State of New York, on the 27th day of May, 1937, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order awarding summary judgment in favor of the plaintiffs and against the defendant, pursuant to Rule 113 of the Rules of Civil Practice, and, pending the determination of said motion, partial judgment for the sum admitted by defendant to be due and owing, and for such other and further relief as to the Court may

seem just and proper, and for the costs and disbursements of this action.

Answering affidavits must be served five days before the return day of the motion.

Dated, New York, N. Y., May 17, 1937.

Harry Hoffman, Attorney for Plaintiffs, 30 Pine Street, Borough of Manhattan, New York City.

To Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, 15 Broad Street, New York City.

[fol. 12] In Supreme Court of New York, County of New York

Amended Complaint

Plaintiffs above named, by Harry Hoffman, their attorney, complain of the defendant and allege:

For a first cause of action, plaintiff, Anglo-Continentale Treuhand, A. G., alleges:

1. Plaintiff, Anglo-Continentale Treuhand, A. G. (hereinafter called "Treuhand") at all times hereinafter mentioned was and now is a corporation duly organized and existing under the laws of the Principality of Liechtenstein, in Europe.

2. Defendant, Bethlehem Steel Company, at all times hereinafter mentioned was and now is a corporation organized and existing under the laws of the State of Pennsylvania, and maintains an office and place of business at 25 Broadway, in the Borough of Manhattan, City and State of New York, and is duly authorized to do business in the State of New York, and has duly designated a person in the State of New York upon whom process may be served.

3. On or about the 1st day of May, 1912, defendant duly made, and for value received, issued and delivered its First Lien and Refunding Mortgage 5% Thirty-Year Gold Bonds (hereinafter called "Bonds") dated May 1, 1912, and due [fol. 13] May 1, 1942, to which certain coupons were attached. Copies of the form of said Bonds and of the form of said coupons are annexed hereto, marked Exhibit "A" and Exhibits "B" and "B-2" respectively and made a part hereof as if fully set forth herein.

4. By said Bonds and by said coupons in the form of Exhibit "B-1", defendant promised to pay to bearer on May 1935, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-Five ($25.) Dollars in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable, in London, England, Five Pounds, Two Shillings, Ten Pence (£5. 2s. 10d.), or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five cents (62.25), being six month's interes' then due on its said Bonds.

5. Plaintiff Treuhand is the legal owner, holder and bearer of five (5) of said coupons due and payable on May 1, 1935.

6. After said due date plaintiff Treuhand, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of sixty-two guilders twenty-five cents (62.25), or three hundred eleven guilders twenty-five cents (311.25), which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

7. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of three hundred eleven guilders twenty-five [fol. 14] cents (311.25) was $211.08, said guilders being on that day of the market value of 67.8164 cents per guilder, or $42.22 per coupon.

8. There is now due and owing by defendant to plaintiff Treuhand the sum of $211.08, the market value in lawful money of the United States of three hundred eleven guilders twenty-five cents (311.25) as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a second cause of action, plaintiff Anglo-Continentale Treuhand, A. G., alleges:

9. Repeats and re-alleges paragraphs numbered 1, 2 and 3 of this complaint, as if fully set forth herein.

10. By said Bonds and by said coupons in the form of Exhibit B-1, defendant promised to pay to bearer on No-

vember 1, 1935, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-five ($25.) Dollars in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable: in London, England, Five Pounds, Two Shillings, Ten Pence (£5. 2s. 10d.), or in Amsterdam, Holland, Sixty-two Guilders Twenty-five Cents (62.25), being six months' interest then due on its said Bonds.

11. Plaintiff, Treuhand, is the legal owner, holder and bearer of one hundred and ninety-seven (197) of said coupons due and payable on November 1, 1935.

12. After said due date, plaintiff Treuhand, by its duly authorized agent, duly presented each of said coupons at the [fol. 15] office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Sixty-two guilders Twenty-five Cents (62.25) or Twelve Thousand Two Hundred Sixty-three Guilders Twenty-five Cents (12,263.25) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

13. On or about November 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Twelve Thousand Two Hundred Sixty-three Guilders Twenty-five Cents (12,263.25) was $8,339.01, said guilders being on that day of the market value of 68 cents per guilder or $42.33 per coupon.

14. There is now due and owing by defendant to plaintiff Treuhand the sum of $8,339.01, the market value in lawful money of the United States of 12,263.25 guilders, being damages suffered by said plaintiff Treuhand by reason of the breach by defendant of its obligations to pay said 12,263.25 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a third cause of action, plaintiff, Anglo-Continentale Treuhand, A. G., alleges:

15. Repeats and re-alleges paragraphs numbered 1, 2 and 3 of this complaint, as if fully set forth herein.

16. By said Bonds and by said coupons, in the form of Exhibit B-2, defendant promised to pay to bearer on No-

vember 1, 1935, at its office or agency in the Borough of [fol. 16] Manhattan, in the City of New York, Twelve Dollars and Fifty Cents ($12.50) in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable: in London, England, Two Pounds, Eleven Shillings, Five Pence (£2. 11s. 5d.), or in Amsterdam, Holland Thirty-one Guilders Thirteen Cents (31.13), being six month's interest then due on its said Bonds.

17. Plaintiff, Treuhand, is the legal owner, holder and bearer of thirty (30) of said coupons due and payable on November 1, 1935.

18. After said due date, plaintiff, Treuhand, by its duly authorized agent, presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Nine Hundred Thirty-three guilders Ninety Cents (933.90) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

19. On or about November 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Nine Hundred Thirty-three Guilders Ninety Cents (933.90) was $635.05, said guilder being on that day of the market value of 68 cents per guilder or $21.17 per coupon.

20. There is now due and owing by defendant to plaintiff, Treuhand, the sum of $635.05, the market value in lawful money of the United States of 933.90 guilders, being dam- [fol. 17] ages suffered by plaintiff, Treuhand, by reason of the breach by defendant of its obligations to pay said 933.90 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a fourth cause of action, plaintiff, Anglo-Continentale Treuhand, A. G., alleges:

21. Repeats and re-alleges paragraphs numbered 1, 2 and 3 of this complaint, as if fully set forth herein.

22. By said Bonds and by said coupons in the form of Exhibit B-1, defendant promised to pay to bearer on May 1, 1936, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-Five ($25) Dollars, in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable: in London, England, Five Pounds, Two Shillings, Ten Pence (£5. 2s. 10d.), or in Amsterdam, Holland, Sixty-two Guilders Twenty-five Cents (62.25), being six months' interest then due on its said Bonds.

23. Plaintiff, Treuhand, is the legal owner, holder and bearer of two hundred and nine (209) of said coupons due and payable on May 1, 1936.

24. After said due date, plaintiff, Treuhand, by its duly authorized agent, presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five Cents (62.25), or Thirteen Thousand and Ten Guilders Twenty-five Cents [fol. 18] (13,010.25) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

25. On or about May 1, 1936, when said coupons became due as aforesaid, the market value in lawful money of the United States of Thirteen Thousand and Ten Guilders Twenty-five Cents (13,010.25) was $8,846.97, said guilder being on that day of the market value of 68 cents per guilder or $42.33 per coupon.

26. There is now due and owing by defendant to plaintiff, Treuhand, the sum of $8,846.97, the market value in lawful money of the United States of 13,010.25 Guilders, being damages suffered by plaintiff, Treuhand, by reason of the breach by defendant of its obligations to pay said 13,010.25 Guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a fifth cause of action, plaintiff, Anglo-Continentale Treuhand, A. G., alleges:

27. Repeats and re-alleges paragraphs numbered 1, 2 and 3 of this complaint, as if fully set forth herein.

28. By said Bonds and by said coupons in the form of Exhibit B-2, defendant promised to pay to bearer on May 1, 1936, at its office or agency in the Borough of Manhattan, in the City of New York, Twelve Dollars and Fifty Cents ($12.50) in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable: in London, England, Two Pounds, Eleven [fol. 19] Shillings, Five Pence (£2, 11s. 5d.), or in Amsterdam, Holland, Thirty-one Guilders Thirteen Cents (31.13), being six months' interest then due on its said Bonds.

29. Plaintiff, Treuhand, is the legal owner, holder and bearer of forty-six (46) of said coupons due and payable on May 1, 1936.

30. After said due date, plaintiff, Treuhand, by its duly authorized agent, presented each of said coupons and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Fourteen Hundred Thirty-three Guilders Ninety-eight Cents (1,433.98) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

31. On or about May 1, 1936, when said coupons became due as aforesaid, the market value in lawful money of the United States of Fourteen Hundred Thirty-three Guilders Ninety-eight Cents (1,433.98) was $975.11, said guilders on that day being of the market value of 68 cents per guilder or $21.17 per coupon.

32. There is now due and owing by defendant to plaintiff, Treuhand, the sum of $975.11, the market value in lawful money of the United States of 1,433.98 guilders, being damages suffered by plaintiff, Treuhand, by reason of the breach by defendant of its obligation to pay said 1,433.98 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

[fol. 20] For a sixth cause of action, plaintiff, Anglo-Continentale Treuhand, A. G., alleges:

33. Repeats and re-alleges paragraphs numbered 1 to 32 inclusive of this complaint, as if fully set forth herein.

34. By reason of defendant's failure and refusal to pay said coupons as aforesaid, plaintiff, Treuhand, incurred

and paid protest fees and expenses of Eleven Guilders Ninety-five Cents (11.95) on or about April 17, 1936, Twenty-three Guilders Fifteen Cents (23.15) on or about July 2, 1936 and Eleven Guilders Twenty Cents (11.20) on or about July 20, 1936.

35. The market value of guilders in lawful money of the United States was on or about said dates, as follows:

April 17, 1936 ..... 68 cents per guilder;
July 2, 1936 ..... 68 cents per guilder;
July 20, 1936 ..... 68 cents per guilder.

36. There is now due and owing by the defendant to the plaintiff, Treuhand, the sum of $31.48, the market value in lawful money of the United States of Forty-six Guilders Thirty Cents (46.30), being damages suffered by plaintiff, Treuhand, by reason of the breach by defendant of its obligation to pay said 46.30 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a seventh cause of action, plaintiff, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) alleges:

37. Plaintiff, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) [hereinafter called [fol. 21] "Maatschappij"] at all times hereinafter mentioned was and now is a corporation duly organized and existing under the laws of the Netherlands.

38. Plaintiff, Maatschappij, repeats and realleges paragraphs numbered 2 and 3 of this complaint, as if fully set forth herein.

39. By said Bonds and by said coupons in the form of Exhibit B-1, defendant promised to pay to bearer on November 1, 1934, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-five ($25) Dollars in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which interest is expressed to be payable: In London, England, Five Pounds, Two Shillings, Ten Pence (£5, 2s. 10d.), or in Amsterdam, Holland, Sixty-two Guilders Twenty-five Cents (62.25), being six months' interest then due on its said Bonds.

40. Plaintiff, Maatschappij, is the legal owner, holder and bearer of one hundred and fifty-one (151) of said coupons due and payable on November 1, 1934.

41. After said due date, plaintiff, Maatschappij, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five cents (62.25), or Nine Thousand Three Hundred Ninety-nine Guilders Seventy-five Cents (9,399.75), which defendant had agreed to pay, but defendant failed, neglected and refused [fol. 22] to pay said coupons in accordance with the tenor thereof.

42. On or about November 1, 1934, when said coupons became due as aforesaid, the market value in lawful money of the United States of Nine Thousand Three Hundred Ninety-nine Guilders Seventy-five Cents (9,399.75) was $6,360.52, said guilders being on that day of the market value of 67.6669 cents per guilder or $42.12 per coupon.

43. There is now due and owing by defendant to plaintiff, Maatschappij, the sum of $6,360.52, the market value in lawful money of the United States of 9,399.75 guilders, being damages suffered by plaintiff, Maatschappij, by reason of the breach by defendant of its obligation to pay said 9,399.75 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For an eighth cause of action, plaintiff, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) alleges:

44. Repeats and re-alleges paragraphs numbered 2, 3, 37 and 38 of this complaint, as if fully set forth herein.

45. By said Bonds and by said coupons, in the form of Exhibit B-2, defendant promised to pay to bearer on November 1, 1934, at its office or agency in the Borough of Manhattan, in the City of New York Twelve Dollars and Fifty Cents ($12.50) in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable: in London, England, Two [fol. 23] Pounds, Eleven Shillings, Five Pence (£2. 11s. 5d.),

or in Amsterdam, Holland, Thirty-one Guilders Thirteen Cents (31.13), being six months' interest then due on its said Bonds.

46. Plaintiff, Maatschappij, is the legal owner, holder and bearer of twenty-six (26) of said coupons due and payable on November 1, 1934.

47. After said due date, plaintiff, Maatschappij, by its duly authorized agent, presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Eight Hundred Nine Guilders Thirty-eight Cents (809.38) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

48. On or about November 1, 1934, when said coupons became due as aforesaid, the market value in lawful money of the United States of Eight Hundred Nine Guilders Thirty-eight Cents (809.38) was $547.68, said guilders being on that day of the market value of 67.6669 cents per guilder or $21.06 per coupon.

49. There is now due and owing by defendant to plaintiff, Maatschappij, the sum of $547.68, the market value in lawful money of the United States of 809.38 guilders, being damages suffered by plaintiff, Maatschappij, by reason of the breach by defendant of its obligation to pay said 909.38 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

[fol. 24] For a ninth cause of action, plaintiff, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) alleges:

50. Repeats and re-alleges paragraphs numbered 2, 3, 4 and 37 of this complaint, as if fully set forth herein.

51. Plaintiff, Maatschappij, is the legal owner, holder and bearer of two hundred and twelve (212) of said coupons due and payable on May 1, 1935.

52. After said due date, plaintiff, Maatschappij, by its duly authorized agent, presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons

payment of Sixty-two Guilders Twenty-five Cents (62.25) or Thirteen Thousand One Hundred Ninety-Seven Guilders (13,197) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

53. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Thirteen Thousand One Hundred Ninety-seven Guilders was $8,949.71, said guilders being on that day of the market value of 67.8164 cents per guilder, or $42.22 per coupon.

54. There is now due and owing by defendant to plaintiff, Treuhand, the sum of $8,949.71, the market value in lawful money of the United States of 13,197 guilders, being damages suffered by plaintiff, Maatschappij, by reason of breach by defendant of its obligation to pay said 13,197 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

[fol. 25] For a tenth cause of action, plaintiff, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) alleges:

55. Repeats and re-alleges paragraphs numbered 2, 3 and 37 of this complaint, as if fully set forth herein.

56. By said Bonds and by said coupons in the form of Exhibit B-2, defendant promised to pay to bearer on May 1, 1935, at its office or agency in the Borough of Manhattan, in the City of New York, Twelve Dollars and Fifty Cents ($12.50) in United States gold coin; or, at the option of the holder, at designated offices in the following cities and countries respectively, at which said interest is expressed to be payable: in London, England, Two Pounds, Eleven Shillings, Five Pence (£2. 11s. 5d.), or in Amsterdam, Holland, Thirty-one Guilders Thirteen Cents (31.13) being six months' interest then due on its said Bonds.

57. Plaintiff, Maatschappij, is the legal owner, holder and bearer of thirty (30) of said coupons due and payable on May 1, 1935.

58. After said due date, plaintiff, Maatschappij, by its duly authorized agent, presented each of said coupons at the office or agency of defendant in Amsterdam, Holland,

and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Nine Hundred and Thirty-three Guilders Ninety Cents (933.90) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

59. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the [fol. 26] United States of Nine Hundred Thirty-three Guilders Ninety Cents (933.90) was about $633.23, said guilders on that day being of the market value of 67.8164 cents per guilder or $21.11 per coupon.

60. There is now due and owing by defendant to Plaintiff, Maatschappij, the sum of $633.23, the market value in lawful money of the United States of 933.90 guilders, being damages suffered by plaintiff, Maatschappij, by reason of the breach by defendant of its obligation to pay said 933.90 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For an eleventh cause of action, Plaintiff, Continentale Trust Maatschappij (Anglo-Continental Trust Company) alleges:

61. Repeats and re-alleges paragraphs numbered 55 to 60 both inclusive of this complaint as if fully set forth herein.

62. By reason of defendant's failure and refusal to pay said coupons as aforesaid, plaintiff, Maatschappij, incurred and paid protest fees and expenses of Nine Guilders Fifteen Cents (9.15) on or about February 26, 1935, Thirty-five Guilders Forty Cents (35.40) on or about June 19, 1935, and Twenty-eight Guilders Forty Cents (28.40) on or about July 9, 1935.

63. The market value of guilders in lawful money of the United States was on or about said dates, as follows:

February 26, 1935	68 cents per guilder.
June 19, 1935	68 cents per guilder.
July 9, 1935	68 cents per guilder.

[fol. 27] 64. There is now due and owing by the defendant to the plaintiff, Maatschappij, the sum of $496.06, the market value in lawful money of the United States of 72.95 guilders,

being damages suffered by plaintiff, Maatschappij, by reason of the breach by defendant of its obligation to pay said 72.95 guilders as aforesaid, no part of which has been paid, although payment was duly demanded.

For a twelfth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

65. Plaintiff, Mondiale Handels-und Verwaltungs, A. G. (hereinafter called "Mondiale") at all times hereinafter mentioned was and now is a corporation organized and existing under the laws of the Principality of Liechtenstein, in Europe.

66. Plaintiff, Mondiale, repeats and re-alleges paragraphs numbered 2, 3 and 39 of this complaint as if fully set forth herein.

67. Plaintiff, Mondiale, is the legal owner, holder and bearer of thirty-seven (37) of said coupons due and payable on November 1, 1934.

68. After said due date, plaintiff, Mondiale, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five cents (62.25), or Twenty-three Hundred and Three Guilders Twenty-five Cents (2,303.25) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

[fol. 28] 69. On or about November 1, 1934, when said coupons became due as aforesaid, the market value in lawful money of the United States of Twenty-three Hundred and Three Guilders Twenty-five Cents (2,303.25) was $1,558.53, said guilders being on that day of the market value of 67.6669 cents per guilder or $42.12 per coupon.

70. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $1,558.54, the market value in lawful money of the United States of 2,303.25 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach by defendant of its obligation to pay said 2,303.25 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a thirteenth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

71. Repeats and re-alleges paragraphs numbered 2, 3, 45 and 65 of this complaint as if fully set forth herein.

72. Plaintiff, Mondiale, is the legal owner, holder and bearer of sixteen (16) of said coupons due and payable on November 1, 1934.

73. After said due date, plaintiff, Mondiale, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Four Hundred Ninety-eight Guilders Eight Cents (498.08) which defendant had agreed to pay, but defendant [fol. 29] failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

74. On or about November 1, 1934, when said coupons became due as aforesaid, the market value in lawful money of the United States of Four Hundred Ninety-eight Guilders Eight Cents (498.08) was $337.04, said guilders being on that day of the market value of 67.6669 cents per guilder or $21.06 per coupon.

75. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $337.04, the market value in lawful money of the United States of 498.08 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach of its obligation to pay said 498.08 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a fourteenth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

76. Repeats and re-alleges paragraphs numbered 2, 3, 4 and 65 of this complaint as if fully set forth herein.

77. Plaintiff, Mondiale, is the legal owner, holder and bearer of fifty-seven (57) of said coupons due and payable on May 1, 1935.

78. After said due date, plaintiff, Mondiale, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland,

and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five Cents (62.25), [fol. 30] or Three Thousand Five Hundred Forty-eight Guilders Twenty-five Cents (3,548.25) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

79. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Three Thousand Five Hundred Forty-eight Guilders Twenty-five Cents (3,548.25) was $2,406.54, said guilders being on that day of the market value of 67.8164 or $42.22 per coupon.

80. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $2,406.54, the market value in lawful money of the United States of 3,548.25 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach by defendant of its obligation to pay said 3,548.25 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a fifteenth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

81. Repeats and re-alleges paragraphs numbered 2, 3, 56 and 65 of this complaint as if fully set forth herein.

82. Plaintiff, Mondiale, is the legal owner, holder and bearer of twenty (20) of said coupons due and payable May 1, 1935.

83. After said due date, plaintiff, Mondiale, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, [fol. 31] and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Six Hundred Twenty-two Guilders Sixty Cents (622.60) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

84. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Six Hundred Twenty-two Guilders Sixty Cents (622.60) was $422.20, said guilders being on that day

of the market value of 67.8164 cents per guilder or $42.22 per coupon.

85. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $422.20, the market value in lawful money of the United States of 622.60 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach of its obligation to pay said 622.60 guilders as aforesaid, no part of which sum has been paid, although payment was fully demanded.

For a sixteenth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

86. Repeats and re-alleges paragraphs numbered 2, 3, 10 and 65 of this complaint as if fully set forth herein.

87. Plaintiff, Mondiale, is the legal owner, holder and bearer of ninety-eight (98) of said coupons due and payable on November 1, 1935.

88. After said due date, plaintiff, Mondiale, by its duly [fol. 32] authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five Cents (62.25) or Six Thousand One Hundred Guilders Fifty Cents (6,100.50), which the defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

89. On or about November 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Six Thousand One Hundred Guilders Fifty Cents (6,100.50) was $4,148.34, said guilders being on that day of the market value of 68 cents per guilder or $42.33 per coupon.

90. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $4,148.34, the market value in lawful money of the United States of 6,100.50 guilders, being damages suffered by said plaintiff, Mondiale, by reason of the breach by defendant of its obligation to pay said 6,100.50 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a seventeenth cause of action, plaintiff, Mondiale Mandels-und Verwaltungs, A. G., alleges:

91. Repeats and re-alleges paragraphs numbered 2, 3, 16 and 65 of this complaint as if fully set forth herein.

92. Plaintiff, Mondiale, is the legal owner, holder and bearer of twenty-two (22) of said coupons due and payable on November 1, 1935.

[fol. 33] 93. After said due date, plaintiff, Mondiale, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), or Six Hundred Eighty-four Guilders Eighty-six Cents (684.86) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

94. On or about November 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Six Hundred Eighty-four Guilders Eighty-six Cents (684.86) was $465.70, said guilders being on that day of the market value of 68 cents per guilder or $21.17 per coupon.

95. There is now due and owing by defendant to plaintiff, Mondiale, $465.70, the market value in lawful money of the United States of 684.86 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach of its obligation to pay said 684.86 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For an eighteenth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

96. Repeats and re-alleges paragraphs numbered 2, 3, 22 and 65 of this complaint as if fully set forth herein.

97. Plaintiff, Mondiale, is the legal owner, holder and bearer of sixty-four (64) of said coupons due and payable on May 1, 1936.

[fol. 34] 98. After said due date, plaintiff, Mondiale, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam,

Holland, and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five Cents (62.25) or Three Thousand Nine Hundred Eighty-Four Guilders (3,984) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

99. On or about May 1, 1936, when said guilders became due as aforesaid, the market value in lawful money of the United States of Three Thousand Nine Hundred Eighty-four guilders (3,984) was $2,709.12, said guilders being on that day of the market value of 68 cents per guilder or $42.33 per coupon.

100. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $2,709.12, the market value in lawful money of the United States of 3,984 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach by defendant of its obligation to pay said 3,984 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a nineteenth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

101. Repeats and re-alleges paragraphs numbered 2, 3, 28 and 65 of this complaint, as if fully set forth herein.

102. Plaintiff, Mondiale, is the legal owner, holder and bearer of twelve (12) of said coupons due and payable on May 1, 1936.

[fol. 35] 103. After said due date, plaintiff, Mondiale, by its duly authorized agent, presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Thirty-one Guilders Thirteen Cents (31.13), of Three Hundred Seventy-three Guilders Fifty-six Cents (373.56) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

104. On or about May 1, 1936, when said coupons became due as aforesaid, the market value in lawful money of the United States of Three Hundred Seventy-three Guilders Fifty-six Cents (373.56) was $254.04, said guilders being on

that day of the market value of 68 cents per guilder or $21.17 per coupon.

105. There is now due and owing by defendant to plaintiff, Mondiale, the sum of $254.04, the market value in lawful money of the United States of 373.56 guilders, being damages suffered by plaintiff, Mondiale, by reason of the breach by defendant of its obligation to pay said 373.56 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a twentieth cause of action, plaintiff, Mondiale Handels-und Verwaltungs, A. G., alleges:

106. Repeats and re-alleges paragraphs numbered 65 to 105 both inclusive of this complaint, as if fully set forth herein.

107. By reason of defendant's failure and refusal to pay [fol. 36] said coupons as aforesaid, plaintiff, Mondiale, incurred and paid protest fees and expenses of Thirty Guilders Forty Cents (30.40) on or about June 18, 1935, Fourteen Guilders Twenty Cents (14.20) on or about April 1, 1936, and Eleven Guilders Twenty Cents (11.20) on or about July 9, 1936.

108. The market value of guilders in lawful money of the United States was on or about said dates, as follows:

June 18, 1935	68 cents per guilder.
April 1, 1936	68 cents per guilder.
July 9, 1936	68 cents per guilder.

109. There is now due and owing by the defendant to the plaintiff, Mondiale, the sum of $37.94, the market value of Fifty-five Guilders Eighty Cents (55.80), being damages suffered by plaintiff, Mondiale, by reason of the breach by defendant of its obligation to pay said 55.80 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a twenty-first cause of action, plaintiff, Hydropress Handels, A. G., alleges:

110. Plaintiff, Hydropress Handels, A. G. (hereinafter called "Hydropress") at all times hereinafter mentioned was and now is a corporation organized and existing under the laws of the Principality of Liechtenstein, in Europe.

111. Plaintiff, Hydropress, repeats and realleges paragraphs numbered 2, 3 and 4 of this complaint as if fully set forth herein.

[fol. 37] 112. Plaintiff, Hydropress, is the legal owner, holder and bearer of eight (8) of said coupons due and payable on May 1, 1935.

113. After said due date, plaintiff, Hydropress, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons payment of Sixty-two Guilders Twenty-five Cents (62.25), or Four Hundred Ninety-eight (498) Guilders which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

114. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of Four Hundred Ninety-eight (498) Guilders was $337.76, said guilders being on that day of the market value of 67.8164 cents per guilder or $42.22 per coupon.

115. There is now due and owing by defendant to plaintiff, Hydropress, the sum of $337.76, the market value in lawful money of the United States of 498 guilders, being damages suffered by plaintiff, Hydropress, by reason of the breach by defendant of its obligation to pay said 498 guilders as aforesaid, no part of which sum has been paid, although payment was duly demanded.

For a twenty-second cause of action, plaintiff, Hydropress Handels, A. G., alleges:

116. Plaintiff, Hydropress Handels, A. G., repeats and re-alleges paragraphs numbered 2, 3, 56 and 110 of this complaint as if fully set forth herein.

[fol. 38] 117. Plaintiff, Hydropress, is the legal owner, holder and bearer of four (4) of said coupons due and payable May 1, 1935.

118. After said due date, plaintiff, Hydropress, by its duly authorized agent, duly presented each of said coupons at the office or agency of defendant in Amsterdam, Holland, and duly demanded with respect to each of said coupons

payment of Thirty-one Guilders Thirteen Cents (31.13) or One Hundred Twenty-four Guilders Fifty-two Cents (124.52) which defendant had agreed to pay, but defendant failed, neglected and refused to pay said coupons in accordance with the tenor thereof.

119. On or about May 1, 1935, when said coupons became due as aforesaid, the market value in lawful money of the United States of One Hundred Twenty-four Guilders Fifty-two Cents (124.52) was $84.44, said guilders being on that day of the market value of 67.8164 cents per guilder or $21.11 per coupon.

120. There is now due and owing by defendant to plaintiff, Hydropress, the sum of $84.44, the market value in lawful money of the United States of 124.52 guilders, being damages suffered by plaintiff, Hydropress, by reason of the breach by defendant of its obligation to pay said 124.52 guilders as aforesaid, no part of which sum has been paid although payment was duly demanded.

For a twenty-third cause of action, plaintiff, Hydropress Handels, A. G., alleges:

121. Repeats and re-alleges paragraphs numbered 110 to 120 both inclusive of this complaint as if fully set forth herein.

122. By reason of defendant's failure and refusal to pay said coupons as aforesaid, plaintiff, Hydropress, incurred [fol. 39] and paid protest fees and expenses of Fourteen Guilders Eighty Cents (14.80) on or about July 20, 1936.

123. The market value of guilders in lawful money of the United States was on or about July 20, 1936, 68 cents per guilder.

124. There is now due and owing by the defendant to the plaintiff, Hydropress, the sum of $10.06, the market value of Fourteen Guilders Eighty Cents (14.80), being damages suffered by plaintiff, Hydropress, by reason of the breach by defendant of its obligation to pay said 14.80 guilders as aforesaid, no part of which has been paid, although payment was duly demanded.

Wherefore, plaintiff, Treuhand, demands judgment against the defendant in the sum of $19,038.70 with interest,

together with the costs and disbursements of this action; and plaintiff, Maatschappij, demands judgment against the defendant in the sum of $16,987.20 with interest, together with the costs and disbursements of this action; and plaintiff, Mondiale, demands judgment against the defendant in the sum of $12,339.49 with interest, together with the costs and disbursements of this action; and plaintiff, Hydropress, demands judgment against the defendant in the sum of $432.26 with interest, together with the costs and disbursements of this action.

Harry Hoffman, Attorney for Plaintiffs, Office and P. O. Address, 30 Pine Street, Borough of Manhattan, New York, N. Y.

(Verified by Harry Hoffman on November 20, 1936.)

[fol. 40] EXHIBIT "A", ANNEXED TO AMENDED COMPLAINT

(First Lien and Refunding Mortgage Bond)

UNITED STATES OF AMERICA,
Commonwealth of Pennsylvania:

No. 00000	No. 00000
$1,000 U. S. Gold	$1,000 U. S. Gold
or	or
£205.15.3. Stg.	£205.15.3. Stg.
or	or
2,490. Guilders	2,490. Guilders

Bethlehem Steel Company

First Lien and Refunding Mortgage Five Per Cent Thirty-Year Gold Bond

Series A

Bethlehem Steel Company (hereinafter called the Company), for value received, hereby promises to pay to the bearer, or if registered, to the registered holder of this bond, on the first day of May, 1942, in the City of New York, U. S. A. One Thousand dollars, or in London, England, Two Hundred and Five Pounds, Fifteen Shillings, Three Pence Sterling, or in Amsterdam, Holland, Two Thousand Four Hundred and Ninety Guilders, and to pay interest on said principal amount from May 1, 1912, in said

respective currencies, at the rate of five per cent per annum, semi-annually on the first day of May and the first day of November in each year, but only upon presentation and [fol. 41] surrender, as they severally mature, of the coupons therefor hereto annexed. Payment of the principal and interest of this bond will be made at the office or agency of the Company in the Borough of Manhattan, in said City of New York, in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed on May 1, 1912, or, at the option of the holder, at designated offices in said foreign cities and countries, respectively, at which it is expressed to be payable.

Both principal and interest of this bond are payable without deduction for any tax or taxes which the Company may be required to pay thereon or to retain therefrom under any present or future law of the United States of America, or of any state, county, municipality or other taxing authority therein.

This bond is one of a duly authorized issue of coupon bonds and registered bonds of the company, known as its First Lien and Refunding Mortgage Five Per Cent Thirty-Year Gold Bonds, limited to the aggregate principal amount of Fifty Million Dollars ($50,000,000) at any one time outstanding, issued and to be issued under and in pursuance of, and all equally secured by, a mortgage and deed of trust dated May 1, 1912, executed by the Company to the Equitable Trust Company of New York, as Trustee, to which mortgage and deed of trust reference is hereby made for a statement of the property mortgaged and pledged and of the nature and extent of the security.

The bonds of said issue are subject to redemption as a whole or in part at the option of the Company or its successors at a premium of five per cent and accrued interest on any semi-annual interest day upon twelve weeks pre- [fol. 42] vious published notice, and to like redemption at the same price through the operation of the sinking fund, as provided in said mortgage and deed of trust.

In the event of certain defaults specified in said mortgage and deed of trust, the principal of the bonds issued thereunder may become or be declared due and payable in the manner and with the effect provided in said mortgage and deed of trust.

This bond shall pass by delivery, unless it shall be registered in the name of the owner at the office or agency of the Company, in the Borough of Manhattan in said City of New York, such registration being noted on the bond by or on behalf of the Company. After such registration no transfer shall be valid unless made at said office or agency by the registered holder hereof in person or by his duly authorized attorney and similarly noted on the bond, but the same may be discharged from registration by being in like manner transferred to bearer, and thereupon transferability by delivery shall be registered; but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery merely.

The holder of any coupon, bond or bonds, of the same series may, at his option, surrender for cancellation his bond or bonds (in the aggregate principal amount of $500 or some multiple thereof) with all unmatured coupons thereto appertaining, in exchange for a registered bond without coupons for the same aggregate principal amount, payable as to principal and interest only in said City of New York and in gold coin of the United States of America, as provided in said mortgage and deed of trust, and on payment, if the Company shall require it, of the transfer [fol. 43] charges therein provided for.

No recourse shall be had for the payment of the principal or interest of this bond, or for any claim based hereon, or otherwise in respect hereof or of said mortgage and deed of trust, against any incorporator, stockholder, officer or director of the Company or of any successor corporation, either directly or through the Company or such successor corporation, whether by virtue of any law or by the enforcement of any assessment or otherwise.

This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed of the Trustee under said mortgage and deed of trust.

In witness whereof, Bethlehem Steel Company has caused these presents to be signed in its name by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and to be attested by its Secretary or one of its Assistant Secretaries, and coupons for interest bear-

ing the engraved facsimile signature of its Treasurer to be attached hereto, as of the first day of May, 1912.

Bethlehem Steel Company, by —— ——, Vice-President.

Attest: —— ——, Assistant Secretary.

[fol. 44] EXHIBIT "B", ANNEXED TO AMENDED COMPLAINT

On the first day of May 1935 unless the Bond, hereinafter mentioned, shall have been called for previous redemption $25.00

Bethlehem Steel Company

will pay to bearer at its office or agency £5.2.10
in the City of New York, U. S. A., Twenty-Five Dollars, United States Gold Coin, or 62.25 Guilders
in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent Thirty-Year Gold Bond.

$25.00 Series A No. M15401

(signed)— B. H. Jones, Treasurer No. 46.

"B"-1

On the first day of Nov. 1934 unless the Bond, hereinafter mentioned shall have been called for previous redemption, $12.50

Bethlehem Steel Company

will pay to bearer at its office or agency in £2.11.5
the City of New York, U. S. A., Twelve and One-Half Dollars, United States Gold 31.13 Guilders
Coin, or in London, England, Two Pounds Eleven Shillings, Five Pence, or in Amsterdam, Holland, Thirty-One Guilders, Thirteen Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent Thirty-Year Gold Bond.

$12.50 Series A No. D267

(signed)— B. H. Jones, Treasurer No. 45.

"B"-2

[fol. 45] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

AMENDED ANSWER

The defendant Bethlehem Steel Company, by Cravath, de Gersdorff, Swaine & Wood, its attorneys, for its amended answer to the amended complaint herein:

1. Refers to the bonds and coupons, respectively, mentioned in paragraph 4 of said complaint for a statement of the terms thereof, respectively, and, except as thus answered, denies each and every allegation contained in paragraph 4 of said complaint.

2. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 5, 6 and 7 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 6 in accordance with the tenor thereof.

3. Denies each and every allegation contained in paragraph 8 of said complaint except that defendant admits that the sum of $211.08 mentioned in said paragraph has not been paid.

4. Refers to the bonds and coupons, respectively, mentioned in paragraph 10 of said complaint for a statement of [fol. 46] the terms thereof, respectively, and, except as thus answered, denies each and every allegation contained in paragraph 10 of said complaint.

5. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 11, 12 and 13 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 12 in accordance with the tenor thereof.

6. Denies each and every allegation contained in paragraph 14 of said complaint except that defendant admits that the sum of $8,339.01 mentioned in said paragraph has not been paid.

7. Refers to the bonds and coupons, respectively, mentioned in paragraph 16 of said complaint for a statement of the terms thereof, respectively, and, except as thus an-

swered, denies each and every allegation contained in paragraph 16 of said complaint.

8. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 17, 18 and 19 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 18 in accordance with the tenor thereof.

9. Denies each and every allegation contained in paragraph 20 of said complaint except that defendant admits that the sum of $635.05 mentioned in said paragraph has not been paid.

[fol. 47] 10. Refers to the bonds and coupons, respectively, mentioned in paragraph 22 of said complaint for a statement of the terms thereof, respectively, and, except as thus answered, denies each and every allegation contained in paragraph 22 of said complaint.

11. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 23, 24 and 25 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 24 in accordance with the tenor thereof.

12. Denies each and every allegation contained in paragraph 26 of said complaint except that defendant admits that the sum of $8,846.97 mentioned in said paragraph has not been paid.

13. Refers to the bonds and coupons, respectively, mentioned in paragraph 28 of said complaint for a statement of the terms thereof, respectively, and, except as thus answered, denies each and every allegation contained in paragraph 28 of said complaint.

14. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 29, 30 and 31 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 30 in accordance with the tenor thereof.

15. Denies each and every allegation contained in paragraph 32 of said complaint except that defendant admits

[fol. 48] that the sum of $975.11 mentioned in said paragraph has not been paid.

16. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 34 and 35 of said complaint.

17. Denies each and every allegation contained in paragraph 36 of said complaint except that defendant admits that the sum of $31.48 mentioned in said paragraph has not been paid.

18. Refers to the bonds and coupons, respectively, mentioned in paragraph 39 of said complaint for a statement of the terms thereof, respectively, and, except as thus answered, denies each and every allegation contained in paragraph 39 of said complaint.

19. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 40, 41 and 42 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 41 in accordance with the tenor thereof.

20. Denies each and every allegation contained in paragraph 43 of said complaint except that defendant admits that the sum of $6,360.52 mentioned in said paragraph has not been paid.

21. Refers to the bonds and coupons, respectively, mentioned in paragraph 45 of said complaint for a statement of the terms thereof, respectively, and, except as thus an-
[fol. 49] swered, denies each and every allegation contained in paragraph 45 of said complaint.

22. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 46, 47 and 48 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 47 in accordance with the tenor thereof.

23. Denies each and every allegation contained in paragraph 49 of said complaint except that defendant admits that the sum of $547.68 mentioned in said paragraph has not been paid.

24. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 51, 52 and 53 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 52 in accordance with the tenor thereof.

25. Denies each and every allegation contained in paragraph 54 of said complaint except that defendant admits that the sum of $8,949.71 mentioned in said paragraph has not been paid.

26. Refers to the bonds and coupons, respectively, mentioned in paragraph 56 of said complaint for a statement of the terms thereof, respectively, and, except as thus answered, denies each and every allegation contained in paragraph 56 of said complaint.

[fol. 50] 27. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 57, 58 and 59 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 58 in accordance with the tenor thereof.

28. Denies each and every allegation contained in paragraph 60 of said complaint except that defendant admits that the sum of $633.23 mentioned in said paragraph has not been paid.

29. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 62 and 63 of said complaint.

30. Denies each and every allegation contained in paragraph 64 of said complaint except that defendant admits that the sum of $496.06 mentioned in said paragraph has not been paid.

31. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 67, 68 and 69 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 68 in accordance with the tenor thereof.

32. Denies each and every allegation contained in paragraph 70 of said complaint except that defendant admits

that the sum of $1,558.54 mentioned in said paragraph has not been paid.

[fol. 51] 33. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 72, 73 and 74 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 73 in accordance with the tenor thereof.

34. Denies each and every allegation contained in paragraph 75 of said complaint except that defendant admits that the sum of $337.04 mentioned in said paragraph has not been paid.

35. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 77, 78 and 79 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 78 in accordance with the tenor thereof.

36. Denies each and every allegation contained in paragraph 80 of said complaint except that defendant admits that the sum of $2,406.54 mentioned in said paragraph has not been paid.

37. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 82, 83 and 84 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 83 in accordance with the tenor thereof.

38. Denies each and every allegation contained in paragraph 85 of said complaint except that defendant admits [fol. 52] that the sum of $422.20 mentioned in said paragraph has not been paid.

39. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 87, 88 and 89 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 88 in accordance with the tenor thereof.

40. Denies each and every allegation contained in paragraph 90 of said complaint except that defendant admits

that the sum of $4,148.34 mentioned in said paragraph has not been paid.

41. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 92, 93 and 94 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 93 in accordance with the tenor thereof.

42. Denies each and every allegation contained in paragraph 95 of said complaint except that defendant admits that the sum of $465.70 mentioned in said paragraph has not been paid.

43. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 97, 98 and 99 of said complaint except that defendant denies that defendant has failed, neglected or refused to pay the coupons referred to in said paragraph 98 in accordance with the tenor thereof.

[fol. 53] 44. Denies each and every allegation contained in paragraph 100 of said complaint except that defendant admits that the sum of $2,709.12 mentioned in said paragraph has not been paid.

45. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 102, 103 and 104 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons referred to in said paragraph 103 in accordance with the tenor thereof.

46. Denies each and every allegation contained in paragraph 105 of said complaint except that defendant admits that the sum of $254.04 mentioned in said paragraph has not been paid.

47. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 107 and 108 of said complaint.

48. Denies each and every allegation contained in paragraph 109 of said complaint except that defendant admits that the sum of $37.94 mentioned in said paragraph has not been paid.

49. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 112, 113 and 114 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons mentioned in said paragraph 113 in accordance with the tenor thereof.

[fol. 54] 50. Denies each and every allegation contained in paragraph 115 of said complaint except that defendant admits that the sum of $337.76 mentioned in said paragraph has not been paid.

51. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 117, 118 and 119 of said complaint except that defendant denies that defendant failed, neglected or refused to pay the coupons mentioned in said paragraph 118 in accordance with the tenor thereof.

52. Denies each and every allegation contained in paragraph 120 of said complaint except that defendant admits that the sum of $84.44 mentioned in said paragraph has not been paid.

53. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 122 and 123 of said complaint.

54. Denies each and every allegation contained in paragraph 124 of said complaint except that defendant admits that the sum of $10.06 mentioned in said paragraph has not been paid.

For a first separate and complete defense to each of the causes of action alleged in said complaint defendant alleges upon information and belief:

55. All of the coupons of which in the First, Second, Third, Fourth and Fifth causes of action alleged in said complaint the plaintiff Anglo-Continentale Treuhand, A. G., [fol. 55] is alleged to be the legal owner, holder and bearer were on and after June 5, 1933, owned by persons resident in the United States; all of the coupons of which in the Seventh, Eighth, Ninth and Tenth causes of action alleged in said complaint the plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) is alleged to be the legal owner, holder and bearer were on and

after June 5, 1933, owned by persons resident in the United States; all of the coupons of which in the Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth causes of action alleged in said complaint the plaintiff Mondiale Handels-Und Verwaltungs, A. G., is alleged to be the legal owner, holder and bearer were on and after June 5, 1933, owned by persons resident in the United States; all of the coupons of which in the Twenty-first and Twenty-second causes of action alleged in said complaint the plaintiff Hydropress Handels, A. G., is alleged to be the legal owner, holder and bearer were on and after June 5, 1933, owned by persons resident in the United States.

56. The bonds to which the coupons referred to in the complaint are or were appurtenant were continuously after June 5, 1933, and to and including the date of presentation for payment of such coupons, owned by residents of the United States, and the coupons referred to in the complaint were attached to said bonds and were likewise owned by residents of the United States from before June 5, 1933 until on or immediately before the respective due dates of said coupons or thereafter. The interests which the respective plaintiffs allege that they have in said coupons were [fol. 56] acquired by said plaintiffs, respectively, from residents of the United States on or shortly before the respective due dates of said coupons or thereafter with full notice and knowledge of Public Resolution No. 10 of the 73rd Congress, entitled "A Joint Resolution to assure uniform value to the coins and currency of the United States", approved June 5, 1933, with intent to evade the application of said Joint Resolution.

57. By reason of the provisions of Section 5 (b) of an Act of Congress entitled "An Act to define, regulate and punish trading with the enemy, and for other purposes", approved October 6, 1917; of an Act of Congress entitled "An act to provide relief in the existing National Emergency in banking, and for other purposes" approved March 9, 1933; of Title III of an Act of Congress entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes", "Title III—Fi-

nancing—and exercising power conferred by Section 8 of Article I of the Constitution: To coin money and to regulate the value thereof.", approved May 12, 1933; of Public Act No. 87 of the Seventy-Third Congress known as "The Gold Reserve Act of 1934", approved January 30, 1934; of executive orders, proclamations and regulations made pursuant to such Acts, and by reason of said Public Resolution No. 10 of the Seventy-Third Congress, entitled "A Joint Resolution to assure uniform value to the coins and currency of the United States", approved June 5, 1933, defendant has not [fol. 57] been since June 5, 1933, and is not now, under any obligation to make payment in guilders of the interest called for by any of the coupons referred to in paragraph 55 of this answer to the respective plaintiffs who are respectively the successors in interest of said persons resident in the United States that owned said coupons on and after June 5, 1933.

For a second separate and partial defense to each of the causes of action alleged in said complaint defendant alleges upon information and belief:

58. Defendant repeats and realleges each and every allegation contained in paragraphs 55, 56 and 57 of this answer with the same force and effect as if herein set forth at length.

59. If the defendant was under any obligation upon the maturity of the coupons referred to in said paragraph 55 hereof to pay said coupons in guilders, it was not, and has not since been and is not now, under any obligation to make payment of the interest called for by said coupons to the respective plaintiffs in guilders exceeding the number equivalent at current rates of exchange on the maturity date of said coupons to the number of dollars, lawful currency of the United States of America, specified in said respective coupons, viz.: Twenty-five dollars ($25) in payment of each such coupon appurtenant to a bond for One thousand dollars and Twelve and 50/100 dollars ($12.50) in payment of each such coupon appurtenant to a bond for Five hundred dollars.

[fol. 58] For a third separate and complete defense to each of the causes of action alleged in said complaint defendant alleges upon information and belief:

60. The respective holders of the bonds to which the respective coupons referred to in the plaintiffs' complaint are

or were appurtenant have not at any time made an election to receive payment of the interest upon said bonds in guilders, and the respective plaintiffs did not exercise or purport to exercise election to receive payment of such coupons in guilders until after the respective due dates of said coupons; thereby the option, if any, to demand payment thereof in guilders or otherwise than in money of the United States lapsed, and defendant has elected and does now elect to pay each of said coupons in money of the United States in the amount of such money therein specified, but the respective plaintiffs have not presented said coupons for payment in such money of the United States or surrendered or offered to surrender said coupons upon such payment thereof as provided in said bonds and said coupons.

For a fourth separate and partial defense to each of the causes of action alleged in said complaint defendant upon information and belief:

61. Repeats and realleges each and every allegation contained in paragraph 60 of this answer with the same force and effect as if herein set forth at length.

[fol. 59] 62. On the respective due dates of said coupons the defendant was ready, willing and able to pay said coupons as they respectively became due in money of the United States of America upon presentation and surrender of said coupons, respectively, at the office or agency of the defendant in the City of New York in said United States as provided in said bonds and said coupons. If, notwithstanding that said coupons have not been presented for surrender and payment in said City of New York, defendant is liable herein upon said coupons in any amount, it is not liable thereon in an amount in excess of the amount in lawful currency of the United States of America specified in said respective coupons, viz., Twenty-five dollars ($25) in payment of each such coupon appurtenant to a bond for One Thousand dollars and Twelve and 50/100ths dollars ($12.50) in payment of each such coupon appurtenant to a bond for Five Hundred dollars, and the defendant is not liable for interest on any such amount.

For a fifth separate and complete defense to each of the causes of action alleged in said complaint, defendant alleges upon information and belief:

63. Defendant is a Pennsylvania corporation, domestic to the United States. At all times mentioned in the complaint, the Internal Revenue Laws of the United States, and the Regulations duly issued thereunder by the Commissioner of Internal Revenue of the United States, required that all domestic corporations paying interest upon bonds, or pay-
[fol. 60] ing coupons for interest upon bonds, should be entitled to receive, as a condition precedent to payment, certificates from the parties presenting such bonds or such coupons for such payment known as "ownership certificates" and showing the facts as to the ownership of such bonds or of the bonds to which such coupons were or had been appurtenant. No such certificates were filed in respect of the bonds or coupons referred to in the complaint, notwithstanding that the same were duly demanded.

Wherefore defendant demands judgment dismissing the complaint herein with the costs and disbursements of this action.

Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, No. 15 Broad Street, New York, N. Y.

(Verified by Wm. J. Brown on January 26, 1937.)

[fol. 61] In Supreme Court of New York, County of New York

Affidavit of Arpad Plesch, Read in Support of Motion

State of New York,
County of New York, ss:

Arpad Plesch, being duly sworn, deposes and says:

I am the Managing Director of each of the plaintiffs herein and am familiar with all the facts and proceedings herein. I am duly authorized to make this affidavit.

The plaintiffs are all foreign corporations. The plaintiffs, Anglo-Continentale Treuhand, A. G. (hereinafter referred to as "Treuhand"), Mondiale Handels-und Verwaltungs, A. G. (hereinafter referred to as "Mondiale") and Hydropress Handels, A. G. (hereinafter referred to as "Hydropress") are all duly organized and existing under the laws of the Principality of Leichtenstein, in Europe. The plaintiff Anglo-Continentale Trust Maatschappij is duly organized and existing under the laws of The Netherlands. The fact that the plaintiffs are all aliens is not denied.

The attorneys for the defendant admitted service of the summons and complaint herein on October 8, 1936; there-

after an amended complaint was served on the attorneys for the defendant on November 21, 1936.

[fol. 62] Thereafter defendant moved to dismiss the amended complaint upon the ground that the Court had not jurisdiction of the subject of the action, which motion was on December 23, 1936 denied by Mr. Justice McCook. The answer to the amended complaint was served by mail and received on January 5, 1937, and an amended answer to the amended complaint was served on January 27, 1937.

Each cause of action stated in the complaint is to recover a debt or liquidated demand, arising out of an express contract, for damages for refusal to pay in Amsterdam, Holland, a fixed number of Dutch guilders as specified or set forth in bearer interest coupons issued by defendant, which coupons were presented by plaintiffs for payment at the office or agency of defendant in Amsterdam, Holland (the place of payment therein designated) and payment of which was then and there refused.

Each coupon upon which this suit is brought was detached from one of the coupon bonds issued by defendant, known as its First Lien & Refunding Mortgage 5% 30-Year Gold Bonds, Series A, dated May 1, 1912, and due May 1, 1942.

A copy of the form of one of said bonds is attached to the amended complaint as Exhibit "A".

A copy of the form of said coupons is attached to the amended complaint as Exhibits "B" and "B"-1.

The form of one of said coupons is here set forth for convenience, as follows:

"On the first day of May 1935 unless the Bond, hereinafter mentioned, shall have been called for previous redemption, Beth- [fol. 63] lehem Steel Company will pay to bearer at its office, or agency, in the City of New York, U. S. A., Twenty-Five Dollars, United States Gold Coin, or in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bond.

$25.00

£5.2.10

62.25 Guilders

$25.00. Series A No. M15401

(Signed) B. H. Jones, Treasurer No. 46

On the first day of Nov. 1934 unless the Bond, hereinafter mentioned shall have been called for previous redemption, Bethlehem Steel Company will pay to bearer at its office or agency in the City of New York, U. S. A., Twelve and One-Half Dollars, United States Gold Coin, or in London, England, Two Pounds Eleven Shillings, Five Pence, or in Amsterdam, Holland, Thirty One Guilders, Thirteen Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bond.

$12.50
£2.11.5
31.13 Guilders

$12.50. Series A No. D267

(Signed) B. H. Jones, Treasurer No. 45

[fol. 64] In the spring of 1912, $15,200,000 of said bonds were originally issued, and subsequently additional bonds were issued, bringing the total amount issued to $40,000,000. Thereafter, there were cancelled or held in the sinking fund a principal amount of said bonds unknown to plaintiffs.

The said $15,200,000 principal amount of said bonds which were issued in the spring of 1912 were purchased from defendant by Bethlehem Steel Corporation (its parent) and sold by the latter to a group of bankers who offered them for sale simultaneously in the United States and in Amsterdam, Holland, by Messrs. Hope & Company and in London, England, by Messrs. Salomon & Company. The circular offering the bonds in Holland issued by Hope & Company in Amsterdam was in the Dutch language.

A translation of a portion of the said circular reads as follows:

"Principal and interest are payable in New York in gold coin of the United States of or equal to the present standard of weight and fineness, and in Amsterdam at the fixed rate of exchange or Fl. 2.49 per dollar without deduction of any tax which the Company may have to pay thereon, or deduct therefrom, in accordance with any existing or future law of the United States or of any state, county or municipality thereof."

These facts appear from the affidavit of William J. Brown, Assistant Treasurer of the defendant Bethlehem

Steel Company and Treasurer of Bethlehem Steel Corpora-
[fol. 65] tion, sworn to December 31, 1934, which affidavit was submitted in opposition to the motion of City Bank Farmers Trust Company for summary judgment against the defendant in its suit on coupons of the same issue as those at bar, and from the affidavit of William W. Miller, sworn to May 8, 1936, in support of a motion for summary judgment against the same defendant in an action in this court entitled Nederlandsche Middenstandsbank N. V. and others against this defendant.

In the said affidavit of William J. Brown, submitted in opposition to the motion for summary judgment in the City Bank Farmers Trust Company v. Bethlehem Steel Company case, he said (at fol. 122 of the Papers on Appeal in that case):

"At the same time at which said $15,200,000 face amount of First Lien and Refunding Bonds were being offered for sale in the United States by New York bankers, *simultaneous but entirely separate and distinct* offerings were being made in London by Messrs. Salomon & Co. and in Amsterdam by Messrs. Hope & Co. A photostatic copy of the circular issued by Salomon & Co. in London and a photostatic copy of a translation of the circular issued by Hope & Co. in Amsterdam are attached hereto, marked Exhibit F, and made a part hereof." (Italics mine.)

Annexed as Exhibit E to the said affidavit of William J. Brown is a letter written by William Salomon & Co., bankers, circulated to the public at the time of the sale of said bonds (Fols. 156-159 of the Papers on Appeal in the City Bank Farmers Trust Company case) wherein appears the following:

[fol. 66] "A simultaneous offering will be made abroad in London, England, by Messrs. Salomon & Co. and in Amsterdam, Holland, by Messrs. Hope & Co., *thus assuring an international market.*" (Italics mine.)

Such expressed purpose (providing for payment of the interest on and the principle of such bonds in foreign countries) was stated by defendant itself, in its letter of January 11, 1934, hereinafter referred to (Exhibit M-1) to be

"to facilitate their sale and distribution in such countries by enabling residents of such countries who might purchase

any of such bonds to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts."

I am now and have for many years been familiar with quotations for foreign exchange and have actually traded in foreign exchange, and have kept actively and closely in touch with foreign exchange fluctuations. From my personal knowledge, acquired through my dealings and through a continuous study and examinations of financial reports and publications on the subject issued both in America and abroad, I am in a position to say that quotations published in the Commercial & Financial Chronicle are generally accepted as true and accurate. The rates of exchange hereinafter quoted are the same rates which prevailed in New York City for the purchase of guilders and which also prevailed in Amsterdam, Holland.

[fol. 67] As to the coupons owned by "*Treuhand*": Plaintiff "Treuhand" was and now is the legal owner, holder and bearer of coupons as follows:

Due Date of Coupons	Number of Coupons	Amount of Guilders specified in each coupon	Total Number of Guilders represented thereby
May 1, 1935	5	62.25	311.25
Nov. 1, 1935	167*	62.25	10,395.75
Nov. 1, 1935	30	31.13	933.90
May 1, 1936	209	62.25	13,010.25
May 1, 1936	46	31.13	1,433.98

Plaintiff "Treuhand" also has a cause of action for 46.30 guilders representing protest fees and expenses consequent upon defendant's refusal to pay the aforesaid coupons on demand.

The various coupons above referred to belonging to "Treuhand" were presented for payment in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co., and demand then and there made for the payment thereof in the number of guilders specified in each coupon respectively, on the following dates: April 17, 1936, July 2, 1936 and July 20, 1936.

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* Paragraph numbered "11" of the amended complaint erroneously alleges 197 coupons.

A photostatic copy of the exemplified demands and protests and of exemplified sworn translations thereof are annexed to this affidavit, marked Exhibits A, B, C and D, respectively, and made a part hereof as if fully set forth herein.

In order to determine the market value in lawful money of the United States as of the respective due dates of the re-
[fol. 68] spective coupons owned by "Treuhand", and as of the respective dates on which demand for payment and refusal of payment was made in Amsterdam, Holland, of the number of guilders to which the plaintiff "Treuhand" is entitled in respect to the aforesaid coupons, I have examined the various pertinent issues of the Commercial & Financial Chronicle, a recognized financial publication, and find the following quotations in respect to the values of the guilder on the respective pertinent dates:

Date	Value
May 1, 1935	67.8164 cents.
Nov. 1, 1935	67.9228 cents.
May 1, 1936	67.8328 cents.
April 17, 1936	67.8828 cents.
July 2, 1936	68.1646 cents.
July 20, 1936	68.1075 cents.

Taking the lowest rate of exchange which prevailed during the entire period from May 1, 1935, through and including the date of the last protest (namely, the rate of 67.8164 cents per guilder), the market value of the 26,131.43 guilders due to plaintiff "Treuhand" for unpaid coupons and protest fees, as above set forth (the subject of the first, Second, Third, Fourth, Fifth and Sixth causes of action) expressed in lawful money of the United States was and is not less than $17,721.39.

As to the coupons owned by "*Maatschappij*": Plaintiff "Maatschappij" was and now is the legal owner, holder and bearer of coupons as follows:

[fol. 69]

Due Date of Coupons	Number of Coupons	Amount of Guilders specified in each coupon	Total Number of Guilders represented thereby
Nov. 1, 1934	151	62.25	9,399.75
Nov. 1, 1934	26	31.13	809.38
May 1, 1935	212	62.25	13,197.
May 1, 1935	30	31.13	933.90

Plaintiff "Maatschappij" also has a cause of action for 72.95 guilders representing protest fees and expenses consequent upon defendant's refusal to pay the aforesaid coupons on demand.

The various coupons above referred to belonging to "Maatschappij" were presented for payment in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co., and demand then and there made for the payment thereof in the number of guilders specified in each coupon respectively, on the following dates: February 26, 1935, June 19, 1935, and July 9, 1935.

A photostatic copy of the exemplified demands and protests and exemplified sworn translations thereof are annexed to this affidavit, marked Exhibits E, F and G, respectively, and made a part hereof as if fully set forth herein.

In order to determine the market value in lawful money of the United States as of the respective due dates of the respective coupons owned by "Maatschappij", and as of the respective dates on which demand for payment and refusal of payment was made in Amsterdam, Holland, of the number of guilders to which the plaintiff "Maatschappij" is entitled in respect to the aforesaid coupons, I have examined the various pertinent issues of the Commercial & Financial Chronicle, a recognized financial publi- [fol. 70] cation, and find the following quotations in respect to the values of the guilder on the respective pertinent dates:

Date	Value
Nov. 1, 1934	67.6669 cents.
May 1, 1935	67.8164 cents.
Feb. 26, 1935	67.9192 cents.
June 19, 1935	67.8878 cents.
July 9, 1935	68.3257 cents.

Taking the lowest rate of exchange which prevailed during the entire period from November 1, 1934, through and including the date of the last protest (namely, the rate of 67.6669 cents per guilder), the market value of the 24,412.98 guilders due to plaintiff "Maatschappij" for unpaid coupons and protest fees, as above set forth (the subject of the Seventh, Eighth, Ninth and Tenth causes of action)

expressed in lawful money of the United States was and is not less than $16,519.50.

As to the coupons owned by "*Mondiale*": Plaintiff "Mondiale" was and now is the legal owner, holder and bearer of coupons as follows:

Due Date of Coupons	Number of Coupons	Amount of Guilders specified in each coupon	Total Number of Guilders represented thereby
Nov. 1, 1934	37	62.25	2,303.25
Nov. 1, 1934	16	31.13	498.08
May 1, 1935	57	62.25	3,548.25
May 1, 1935	20	31.13	622.60
Nov. 1, 1935	98	62.25	6,100.50
Nov. 1, 1935	22	31.13	684.86
May 1, 1936	64	62.25	3,984.00
May 1, 1936	12	31.13	373.56

[fol. 71] Plaintiff "Mondiale" also has a cause of action for 55.80 guilders representing protest fees and expenses consequent upon defendant's refusal to pay the aforesaid coupons on demand.

The various coupons above referred to belonging to "Mondiale" were presented for payment in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co., and demand then and there made for the payment thereof in the number of guilders specified in each coupon respectively, on the following dates: June 18, 1935, April 1, 1936 and July 9, 1936.

A photostatic copy of the exemplified demands and protests and of exemplified sworn translations thereof are annexed to this affidavit, marked Exhibits H, I, J and K, respectively, and made a part hereof as if fully set forth herein.

In order to determine the market value in lawful money of the United States as of the respective due dates of the respective coupons owned by "Mondiale", and as of the respective dates on which demand for payment and refusal of payment was made in Amsterdam, Holland, of the number of guilders to which the plaintiff "Mondiale" is entitled in respect to the aforesaid coupons, I have examined the various pertinent issues of the Commercial & Financial Chronicle, a recognized financial publication, and find the following quotations in respect to the values of the guilder on the respective pertinent dates:

[fol. 72]

Date	Value
Nov. 1, 1934	67.6669 cents.
May 1, 1935	67.8164 cents.
June 18, 1935	67.9150 cents.
Nov. 1, 1935	67.9228 cents.
April 1, 1936	67.4985 cents.
May 1, 1936	67.8328 cents.
July 9, 1936	68.1164 cents.

Taking the lowest rate of exchange which prevailed during the entire period from November 1, 1934, through and including the date of the last protest (namely, the rate of 67.4985 cents per guilder), the market value of the 18,170.90 guilders due to plaintiff "Mondiale" for unpaid coupons and protest fees, as above set forth (the subject of the Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth and Twentieth causes of action) expressed in lawful money of the United States was and is not less than $12,265.08.

As to the coupons owned by *"Hydropress"*: Plaintiff "Hydropress" was and now is the legal owner, holder and bearer of coupons as follows:

Due Date of Coupons	Number of Coupons	Amount of Guilders specified in each coupon	Total Number of Guilders represented thereby
May 1, 1935	8	62.25	498.00
May 1, 1935	4	31.13	124.52

Plaintiff "Hydropress" also has a cause of action for 14.80 guilders representing protest fees and expenses consequent upon defendant's refusal to pay the aforesaid coupons on demand.

[fol. 73] The various coupons above referred to belonging to "Hydropress" were presented for payment in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co., and demand then and there made for the payment thereof in the number of guilders specified in each coupon respectively, on or about July 20, 1936.

A photostatic copy of the exemplified demands and protests and of exemplified sworn translations thereof are an-

nexed to the affidavit, marked Exhibit L, and made a part hereof as if fully set forth herein.

In order to determine the market value in lawful money of the United States as of the due date of the coupons owned by "Hydropress", and as of the date on which demand for payment and refusal of payment was made in Amsterdam, Holland, of the number of guilders to which the plaintiff "Hydropress" is entitled in respect to the aforesaid coupons, I have examined the various pertinent issues of the Commercial & Financial Chronicle, a recognized financial publication, and find the following quotations in respect to the values of the guilder on the respective pertinent dates:

Date	Value
May 1, 1935	67.8164 cents.
July 20, 1936	68.1075 cents.

Taking the lowest rate of exchange which prevailed during the entire period from May 1, 1935, through and including the date of the protest (namely, the rate of 67.8164 cents per guilder), the market value of the 637.32 guilders due to [fol. 74] plaintiff "Hydropress" for unpaid coupons and protest fees, as above set forth (the subject of the Twenty-first, Twenty-second and Twenty-third causes of action) expressed in lawful money of the United States was and is not less than $432.21.

As to all plaintiffs: Although plaintiffs believe that the right of election in respect of the coupons resides in the holder of the coupons, irrespective of who the holder of the bond may be, and that the ownership of the bonds is in any event immaterial, the fact is that the respective plaintiffs were, on the respective due dates of the several coupons sued upon, the owners of the bonds from which such respective coupons had been detached and that the respective plaintiffs are now, and at all times since the dates when said coupons respectively became due were, the owners respectively of a number of bonds sufficiently large in principal amount to have produced the number of coupons here sued upon. The numbers of the bonds owned by plaintiffs, however, may from time to time have changed due to the fact that said bonds are pledged as collateral in various brokerage accounts, and in connection with such pledges the brokers have received, and may have exercised, the right to use and deliver against sales made by others than the said plaintiffs,

bonds belonging to the plaintiffs, and to substitute in lieu of such bonds so used or delivered other bonds of an equal aggregate principal amount; such pledge, and such substitution of one bond of an equal principal amount for another bond of an equal principal amount, is in accordance with usage and custom both in New York City and in foreign countries.

[fol. 75] Articles 1308, 1309, 1310, 1311 and 1313 of the Dutch Civil Code provide that in cases of alternative obligations the debtor is absolved by the delivery of one of two things contained in the obligation, and that the choice belongs to the debtor unless it has been granted to the creditor; if, where the choice has been left to the creditor, one of the two things has perished or can no longer be delivered, the creditor is entitled to the other.

Prior to September 26, 1936, Holland was upon a bimetallic basis, and in addition it was and is provided by the Act of Parliament dated July 18, 1904 (Official Gazette No. 189) that the notes of the Netherlands Bank are legal tender in Holland. There has never existed an obligation on the Netherlands Bank to pay in gold coin such bank notes as are presented to it for payment.

According to Article 18 of the Banking Law of 1919 (State Papers No. 553 of 1918) the notes of the Netherlands Bank were made payable daily on demand, except on certain specified days mentioned in Article 154 of the Commercial Code, and except that payment at the agencies of the Netherlands Bank might be delayed until specie may have been received from the head office. These notes were provided to be payable by the Netherlands Bank, at its choice, either in gold coins of 10 and 5 guilders, or in silver coins of 2.50 guilders, 1 guilder and 50 cents for unlimited amounts, or in petty coin for limited amounts. It thus appears that the holder of guilders could not and cannot legally demand gold or gold coins exclusively in exchange therefor.

Prior to September 26, 1936, the Netherlands Bank was permitted to export gold, but on or about September 26, [fol. 76] 1936, by royal decree dated on that day, the export of gold coin and of gold bullion was prohibited, and said royal decree was confirmed by the Law of September 30, 1936 (Staatsblad No. 101).

As stated above, at all the respective times herein mentioned, and at all the respective times referred to in the amended complaint, the respective plaintiffs were the own-

ers, holders and bearers of the bonds to which the respective coupons referred to in this affidavit appertain; and at all of said respective times the respective plaintiffs were and at all times thereafter have been and now are ready, able and willing to deliver so-called "ownership certificates", although under no legal obligation to do so, and although such ownership certificates are not required of the plaintiffs, and although principal and interest of said bonds, as appears from Exhibit A attached to the amended complaint, are payable without deduction for any tax or taxes which the company may be required to pay thereon and to retain therefrom under any present or future law of the United States or of any state, county, municipality or other taxing authority therein. Although the coupons at bar are bearer coupons and negotiable instruments, defendant refused to pay them according to their terms upon presentation for payment at Amsterdam, Holland, unless the owner submitted with the coupons an affidavit to the effect, first, that said owner has been for the last six months a bona fide resident of a country other than the United States of America and, second, that the bonds to which the coupons are appurtenant have been since June 5, 1933, uninterruptedly [fol. 77] the property of bona fide residents of a country other than the United States of America. (The form of said affidavit is hereinafter discussed and, as hereinafter stated, a copy thereof is hereto attached as Exhibit N.)

There is no requirement in the coupons themselves (nor in the bonds from which they were detached, nor in the Indenture securing said bonds) compelling plaintiffs to make any such affidavits or statements, or any affidavits or statements whatsoever, or to submit any other proof of any nature whatsoever either with respect to residence or ownership or otherwise as a condition precedent to payment of the coupons.

The reasons for this attitude on the part of the defendant appear in the letters which Bethlehem Steel Corporation, sole stockholder of the defendant corporation, sent on behalf of defendant to the New York Stock Exchange under date of January 11, 1934 and August 7, 1934, respectively, copies of which are attached hereto as Exhibits M-1 and M-2, respectively, and made a part hereof as if herein set forth at length. Said letters appear in the Bulletins published by the New York Stock Exchange, dated January 13, 1934, and August 11, 1934, respectively.

In the letter of January 11, 1934, it appears that defendant took the position that Joint Resolution No. 10 of the 73rd Congress of the United States, adopted June 5, 1933, relieved defendant from its obligation to make payment in foreign countries in foreign currency to residents of the United States, but that it would make payment in such countries and in the currencies thereof in the amounts specified in the coupons to owners of such bonds residing in [fol. 78] foreign countries upon presentation and surrender of the coupons appurtenant thereto for the purpose. No condition, whether as to affidavits or ownership or of residence or otherwise, was imposed in the letter of January 11, 1934 as a condition precedent to payment, and no distinction is made between American citizens residing abroad and aliens.

However, in the letter dated August 7, 1934 it appeared that defendant had arbitrarily changed its position in respect of residents of foreign countries and imposed upon them the burden of submitting the affidavits and proofs above referred to, in order to enable owners of coupons (which were bearer instruments and passed by delivery) to receive payment thereon.

It seems that this changed attitude of defendant became effective in regard to the coupons maturing November 1, 1934 and subsequent thereto, although defendant did not apply the same to the coupons owned by residents of foreign countries maturing May 1, 1934, which were paid in accordance with the views expressed in the letter of January 11, 1934.

There are no substantial denials in the amended answer of any of the affirmative facts pleaded (except formal denial of failure, neglect or refusal to pay and formal denial of knowledge or information sufficient to form a belief as to the presentment, demand and protest); and the amended answer affirmatively admits that the respective amounts sued for have not been paid.

The coupons in suit will be physically produced in court upon the argument of this motion; the original exemplified [fol. 79] protests, copies of all of which are attached to this affidavit as exhibits, will likewise be physically produced in court upon the argument of this motion; thus, there remain no questions of fact to be determined by this Court.

In the amended answer defendant asserts in the first affirmative defense that all of the coupons sued upon were

on and after June 5, 1933 owned by persons resident in the United States, that the bonds to which the coupons referred to in the complaint were appurtenant were also so owned, and that the interests which the respective plaintiffs allege they have in said coupons were acquired by said plaintiffs respectively from residents of the United States on or shortly before the respective due dates of said coupons or thereafter, with full notice and knowledge of Joint Resolution No. 10 of the 73rd Congress, and that defendant is not obligated to pay the number of guilders expressed in the coupons to plaintiffs.

In its second affirmative defense, defendant asserts that if it was under any obligation upon maturity of the coupons to pay said coupons in guilders, it is only required to pay the number of guilders in respect to each coupon equivalent to $25 at the current rate of exchange on the maturity date. This defense is merely a corollary of the first defense.

In the third affirmative defense, defendant asserts that the respective holders of the bonds to which the coupons were appurtenant have not elected to receive payment of interest upon said bonds in guilders, and that the respective plaintiffs did not exercise their election to receive such payment until after the respective due dates of said coupons and that [fol. 80] thereby plaintiffs lost their right to receive payment otherwise than in money of the United States. This defense ignores the fact that the coupons upon their face express equal alternatives of payment, and that the coupons, as expressed in each separate foreign currency, are separate and distinct negotiable instruments payable not only in respect of United States money but also separately in respect of each and every of the foreign currencies specified and referred to in said coupons.

In the fourth affirmative defense, defendant makes the general allegation that if, notwithstanding that said coupons have not been presented for surrender and payment in the City of New York, defendant is liable here upon said coupons in any amount, defendant is not liable thereon in excess of the amount in lawful currency of the United States specified in said respective coupons.

In the fifth affirmative defense, defendant asserts that no so-called "ownership certificates" were filed in connection with the payment of the coupons, expressly ignoring the fact that defendant failed and refused to pay said coupons in guilders, and had made public announcement of its intention

so to fail and refuse to pay (except upon compliance with unauthorized conditions) long before the coupons were presented, and expressly further ignoring the fact that no affirmative duty is in any event cast upon plaintiffs to submit ownership certificates as a condition precedent to such payment, and notwithstanding the further fact that upon the presentation of the coupons defendant submitted to plaintiffs' representative forms of affidavit which it would re-
[fol. 81] quire plaintiffs to sign before any payment would be made in guilders in any event. The only penalty plaintiffs would suffer by failure to file ownership certificates would be that defendant would deduct and withhold the tax from any payment made.

A photostat of the form of affidavit submitted to plaintiffs' representative and which defendant required and now requires as a condition precedent to payment of the aforesaid coupons in the specified amount of guilders, is attached hereto, marked Exhibit N, and made a part hereof as if fully set forth herein.

Plaintiffs are unwilling to comply with defendant's unauthorized and self-imposed demands that plaintiffs execute and deliver to defendant any such affidavits; but plaintiffs (notwithstanding they were under no duty to do so) were at the time when said coupons were presented for payment in guilders in Amsterdam, Holland, ready, able and willing to deliver to defendant duly executed ownership certificates upon payment of the number of guilders specified in said coupons; and (notwithstanding they were under no duty to do so) plaintiffs at all times since have been and are now ready, able and willing to deliver to defendant duly executed ownership certificates upon proper payment of the proper amounts justly due to plaintiffs. There is nothing in the Revenue Acts of the United States or in the Rules or Regulations pursuant thereto, which imposes any duty upon plaintiffs to file or deliver so-called "ownership certificates", especially where, as here, actually failure to deliver the same is not the real ground of refusal and payment was actually refused upon other grounds.

[fol. 82] It is admitted by defendant that the provisions for alternative payment in specified and fixed amounts in foreign countries, in the respective currencies of those foreign countries, were inserted for the purpose of giving a wider market for these securities; it is a fact, also, that this issue of bonds was originally listed on the New York,

London and Amsterdam Stock Exchanges and that it is now listed only upon the London Stock Exchange, but is mainly traded in in Amsterdam. It is undoubtedly the fact, also, that bonds of this issue have been and are traded in by insurance companies for the purpose of covering insurance and re-insurance risks in the various currencies in which those insurance commitments obtained. But whatever the reason may have been, the coupons in clear and unmistakable terms state that they may be presented for payment in foreign countries for specific amounts in the currencies of those foreign countries, if the holders of the coupons present for payment there, and that defendant expressly stipulated in the coupons that they are payable in foreign currencies, in foreign countries, and in specified and fixed amounts of such foreign currencies.

No question is raised by the amended answer as to the validity of the coupons. Only questions of law are presented by the amended answer, the only real defense being that defendant claims that plaintiffs acquired the coupons in suit from United States residents with full notice and knowledge of the Joint Resolution of Congress, and that defendant therefore is prohibited or relieved from paying the said coupons in guilders.

The other defenses raised also create no issue of fact, being, in substance, that plaintiffs never demanded the pay- [fol. 83] ment in lawful money of the United States in the face dollar amount of the coupons (obviously a frivolous defense), since the dollar was only one of the separate and distinct alternatives in which plaintiffs could choose payment, and which, in fact, they did not choose; and that the plaintiffs did not file ownership certificates.

No issue of fact is raised by the amended answer. The amended answer contains no meritorious defense to plaintiffs' claims. Summary judgment should be granted to the plaintiffs and an order should be entered assessing the damages to which the plaintiffs are entitled, and in the meantime an order should be entered directing payment to plaintiffs of the amount defendant admits to be owing.

[Sworn to by Arpad Plesch on May 17, 1937.]

[Exhibits A to L inclusive omitted in printing pursuant to stipulation and order printed herein on pages 86 to 97.]

[fol. 84] EXHIBIT M-1 ANNEXED TO AFFIDAVIT OF ARPAD PLESCH

Letter Dated January 11, 1934, from Bethlehem Steel Corporation, as Published by the New York Stock Exchange in Bulletin of January 13, 1934

"Letter has been received from Bethlehem Steel Corporation in regard to payment of coupons upon the following issues:

(1) The First Lien & Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942.

(2) The First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company, assumed by Bethlehem Iron & Steel Corporation, due March 1, 1950.

This letter is quoted in full below:

'Referring to your letter of December 8th, 1933, inquiring as to the policy to be followed with respect to the payment of coupons on certain bond issues expressed to be payable in foreign currencies:

'There are two such issues of bonds issued or assumed by our subsidiary companies: (1) the First Lien and Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942, and (3) the First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company assumed by one of our subsidiaries, Bethlehem Iron and Steel Corporation, and due March 1, 1950.

'The subject of your inquiry is an important one, not only to us but to many other interests in this country, and on that [fol. 85] account we have been giving a great deal of consideration to it, which has caused our delay in writing you.

'The first thing we wish to have clearly understood is that Bethlehem intends fully to perform its obligations with respect to all its bonds. No one should get the contrary idea from the fact that we have not paid in foreign currencies coupons detached from bonds owned by residents of this country. The general question presented is: What are Bethlehem's obligations in respect of them? If, as we hereinafter indicate to be the case, Bethlehem is not legally bound to pay in foreign currencies any of the coupons from bonds owned in this country, then, of course, its officers can-

not properly authorize the payment thereof in such currencies.

'The apparent purpose of providing for payment of the interest on and the principal of such Bonds in foreign countries was to facilitate their sale and distribution in such countries by enabling residents of such countries who might purchase any of such Bonds to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts. In accordance with such purpose, we made or will make provision whereby owners of such Bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof in such countries and in the currencies of such countries in the amount specified in such coupons for such countries.

'As regards the payment of the interest on such Bonds owned by those residing in the United States, we call your [fol. 86] attention to Public Resolution No. 10 of the Seventy-third Congress, approved June 5, 1933, which among other things in substance declares that every provision in any obligation payable in money of the United States which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or in an amount of money of the United States measured thereby is against public policy and provides that every such obligation (whether or not it contains any such provision) shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

'Assuming this Resolution to be applicable to the above-mentioned Bonds, we must regard it as binding upon and the public policy thereby declared applicable to, all residents of the United States, including this Company.

'Accordingly, we have paid and shall continue to pay, in accordance with their terms, matured coupons from the above-mentioned Bonds, owned by residents of the United States in lawful money of the United States upon presentation and surrender of such coupons at the office of Bethlehem, 25 Broadway, New York City; but the above-mentioned Resolution continuing in effect, we shall deem it our duty to decline to make payment in foreign countries of such coupons to residents of the United States in gold or in any

foreign currency, unless and until it has been finally determined that we are justified in making such payment.' "

[fol. 87] EXHIBIT M-2, ANNEXED TO AFFIDAVIT OF ARPAD PLESCH

Letter Dated August 7, 1934 from Bethlehem Steel Corporation as Published by the New York Stock Exchange in Bulletin of August 11, 1934

The following letter has been received from the Bethlehem Steel Corporation under date of August 7, 1934:

'Referring to my letter to you of January 11, 1934, regarding the payment in foreign countries of coupons for interest on the First Lien and Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942, and the First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company assumed by Bethlehem Iron and Steel Corporation and due March 1, 1950:

'I am writing to advise you that the respective paying agents for such bonds in the respective foreign countries in which such bonds and the coupons appurtenant thereto are expressed to be payable are being authorized to make payment of such coupons in the currencies of such countries in the respective amounts stated in such coupons when and as such coupons shall be surrendered to such agents for payment in accordance with their terms, but only if such coupons shall be accompanied by

(1) An affidavit signed and sworn to by the owner of the bond or bonds from which such coupons were detached or by a duly authorized representative of such owner on a date not more than twenty days prior to the date on which such coupons shall be so surrendered and showing:

[fol. 88] (a) The number or numbers of the bond or bonds from which such coupons were detached;

(b) The name of the owner of such bond or bonds;

(c) That such owner is at the date of the making of such affidavit, and has been continuously for a period of six months prior to said date, a bona fide resident of a country or countries other than the United States of America; and

(d) That the bond or bonds from which such coupons were detached has or have been owned by a bona fide resi-

dent or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933; and

(2) In the case of a non-resident alien of the United States of America, United States Treasury Department Ownership Certificate Form No. 1001 (green) duly filled in and signed by such owner, or, in the case of a national of the United States of America resident of a country other than the United States of America, United States Treasury Department Ownership Certificate Form No. 1000 (White) duly filled in and signed by such owner.

'As I pointed out in my letter to you of January 11, 1934, we wish to have it clearly understood that Bethlehem intends fully to perform its obligations with respect to all of its bonds. So long, however, as Joint Resolution No. 10 of the [fol. 89] 73rd Congress, approved June 5, 1933, shall continue in effect, we shall deem it our duty to decline to make payment in foreign countries, in gold or in any foreign currency of coupons from the above-mentioned bonds which were owned by residents of the United States on the date of the approval of such Joint Resolution, unless and until it shall have been finally determined that we are justified in making such payment.

Wm. J. Brown, Treasurer.'"

(Here follows 1 photograph, side folio 90.)

EXHIBIT "N", ANNEXED TO AFFIDAVIT OF ARPAD PLESCH

To BETHLEHEM STEEL COMPANY,
Cunard Building.
New York, N. Y.

Dear Sirs,
Mijne Heeren,

I (We) do solemnly declare:
Ik (Wij) verklaar (verklaren) hierbij plechtig:

that I (we) am (are) the owner(s) of:
dat ik (wij) eigenaar(s) ben (zijn) van:

$.....BETHLEHEM STEEL COMPANY, FIRST LIEN AND REFUNDING MORTGAGE 5% BONDS

NRS. .....

.....

from which the accompanying coupons due.....19....., tendered herewith for
waarvan de coupon(s) vervallen.....19....., welke ik (wij) hierbij

payment, have been detached;
ter betaling aanbied(en), afkomstig zijn;

that I (we) am (are) at this date, and I (we) have been continuously for a period of six
dat ik (wij) thans een bona fide ingezetene van een ander land of landen dan de Vereenigde

months prior to this date, a bona fide resident of a country or countries other than the United States of America;
Staten van Amerika ben (zijn) en dit onafgebroken gedurende de laatste 6 maanden ben (zijn) geweest;

that the bond or bonds from which this (these) coupon(s) was (were) detached has or have been
dat de obligatie(s) waarvan deze coupon(s) afkomstig is (zijn) sedert 5 Juni 1933 onafgebroken het

owned by a bona fide resident or bona fide residents of a country or countries other than the United
eigendom is (zijn) geweest van een bona fide ingezetene van een ander land of landen dan de Vereenigde

States of America continuously since June 5, 1933;
Staten van Amerika;

that my (our) permanent residence is at;
dat mijn (onze) vaste woonplaats is;

.....

..... 193...

I (We) hereby certify that the statements
Ik (Wij) verklaar (verklaren) hierbij de
contained in the foregoing declaration
juistheid van bovenstaande verklaring te
are correct.
bevestigen.

SIGNATURE OF OWNER OF BONDS.
Handteekening van den eigenaar van de Obligaties.

.....193...

(SIGNATURE OF BANKER, BROKER OR NOTARY PUBLIC)
(Handteekening van een Bankier, Commissionnair in
Effecten of Notaris)

604

[fol. 91] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

AFFIDAVIT OF GEORGE LE BLANC, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

George L. Le Blanc, being duly sworn, deposes and says:

I am an advisor in currency matters, including foreign exchange, with offices at 44 Wall Street, in the City of New York.

From 1912 to 1914 I was Manager of the Foreign Department of the American Express Company in New York From 1914 to 1929 I was Manager, and from 1916 to 1929 I was Vice-President of the Foreign Department of the Equitable Trust Company of New York, which conducted one of the largest businesses in foreign exchange in the world. From 1920 to 1929 I was President of the Equitable Eastern Banking Corporation of New York. From 1929 to 1930 I was President of the Interstate Trust Company of New York. From 1930 to the present as an advisor in matters of currency and foreign exchange, I have at all times been interested in and concerned with the money markets of the world and various currency fluctuations in them.

I have had wide experience trading in foreign exchange, and have bought and sold foreign currencies. During my [fol. 92] entire connection with the business of foreign exchange I have been and am familiar with the prices generally at which Dutch guilders have sold in New York. As part of my work, I have been and am familiar with dollar prices generally in world markets and I have been and am familiar with the prices at which the dollar has sold in Amsterdam, Holland.

I have seen a copy of the following cable sent to Amsterdamsche Bank at Amsterdam by Harry Hoffman, the attorney for the plaintiffs in this action:

"PLEASE ADVISE DEFERRED CABLE HIGH AND LOW FOR UNITED STATES DOLLARS IN AMSTERDAM ON NOVEMBER FIRST 1934 FEBRUARY TWENTY-SIXTH MAY FIRST JUNE EIGHTEENTH JUNE NINETEENTH JULY NINTH NOVEMBER FIRST 1935 APRIL FIRST APRIL SEVENTEENTH

MAY FIRST JULY SECOND JULY NINTH JULY TWENTIETH 1936 ADDRESS 30 PINE STREET NEWYORK"

I have also seen the following cable received from the Amsterdamsche Bank at Amsterdam in reply to the above cable:

"YOURS EIGHTH NOVEMBER FIRST 1934 14781 14767 FEBRUARY TWENTY-SIXTH 14750 14712 MAY FIRST 14775 14712 JUNE EIGHTEENTH 14750 14725 JUNE NINETEENTH 14737 14718 JULY NINTH 14667 14631 NOVEMBER FIRST 1935 14737 14712 APRIL FIRST 14737 14700 APRIL SEVENTEENTH 14743 14725 [fol. 93] MAY FIRST 14750 14737 JULY SECOND 14681 14656 JULY NINTH 14687 14667 JULY TWENTIETH 1936 14687 14667 WITHOUT RESPONSIBILITY"

This cable contains the following quotations of United States dollars in terms of guilders in Amsterdam, on the dates stated:

Date	Guilders per dollar		Equals Cents per Guilder	
	High	Low	High	Low
November 1, 1934	1.4781	1.4767	67.972	67.654
February 26, 1935	1.4750	1.4712	67.972	67.797
May 1, 1935	1.4775	1.4712	67.972	67.682
June 18, 1935	1.4750	1.4725	67.912	67.797
June 19, 1935	1.4737	1.4718	67.944	67.856
July 9, 1935	1.4667	1.4631	68.348	68.180
November 1, 1935	1.4737	1.4712	67.972	67.856
April 1, 1936	1.4737	1.4700	68.027	67.856
April 17, 1936	1.4743	1.4725	67.912	67.829
May 1, 1936	1.4750	1.4737	67.856	67.797
July 2, 1936	1.4681	1.4656	68.231	68.115
July 9, 1936	1.4687	1.4667	68.180	68.087
July 20, 1936	1.4687	1.4667	68.180	68.087

The above cabled quotations are from a large Amsterdam bank. Such quotations are relied upon by dealers in foreign exchange as accurate. On the basis of the above quotations, and on the basis of my past experience trading in foreign exchange as well as my experience as an advisor in currency matters, and in the light of my knowledge of the value of the dollar in Amsterdam, Holland, I conclude and it is my

opinion that the above quotations represent the true value of the dollar in terms of guilders at Amsterdam, on the dates mentioned.

(Sworn to by George L. Le Blanc on September 9, 1937.)

[fol. 94] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

AFFIDAVIT OF VICTOR OSIAS, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Victor Osias, being duly sworn, deposes and says:

I am employed by Sutro Bros. & Co. as clerk and am familiar with the account of Anglo-Continentale Treuhand, A. G.

From September 12, 1933, to and including August 7, 1934, Anglo-Continentale Treuhand, A. G. purchased through Sutro Bros. & Co. a total of 350 bonds known as Bethlehem Steel Corporation First Lien & Refunding Mortgage, Series A, 5% Bonds, Due May 1, 1942; the par principal amount of each of said bonds as expressed in United States currency is $1,000; as expressed in Dutch guilders, is 2490 guilders; and as expressed in English pounds is £205.15.3. sterling.

The dates of purchase, and the number of bonds so purchased, as disclosed by said records, are as follows:

Date	Number of Bonds
September 12, 1933	2
" 15, 1933	12
" 18, 1933	8
" 19, 1933	15

[fol. 95]

September 20, 1933	5
" 22, 1933	5
" 25, 1933	25
" 26, 1933	4

Date		Number of Bonds
October	3, 1933	17
"	4, 1933	5
"	23, 1933	3
"	31, 1933	1
November	3, 1933	1
"	9, 1933	4
"	10, 1933	2
"	22, 1933	1
"	27, 1933	1
December	4, 1933	1
"	20, 1933	7
"	21, 1933	5
"	22, 1933	2
"	26, 1933	3
"	27, 1933	2
"	28, 1933	3
January	4, 1934	3
"	2, 1934	2
"	25, 1934	1
"	26, 1934	3
"	29, 1934	10
"	30, 1934	5
"	31, 1934	5
February	7, 1934	10
"	9, 1934	10
"	13, 1934	25
"	14, 1934	10
"	15, 1934	7
"	15, 1934	3
"	20, 1934	17
March	5, 1934	3
"	7, 1934	1
"	9, 1934	1
"	12, 1934	8
"	13, 1934	5
"	20, 1934	10
"	23, 1934	5
[fol. 96]		
April	10, 1934	6
"	11, 1934	4
"	24, 1934	10
"	30, 1934	15

Date	Number of Bonds
May 21, 1934	1
" 22, 1934	20
" 23, 1934	1
" 24, 1934	1
" 25, 1934	1
" 28, 1934	1
" 29, 1934	1
June 1, 1934	2
" 4, 1934	1
" 5, 1934	4
" 6, 1934	3
" 15, 1934	1

Of said bonds, 139 thereof were purchased prior to January 7, 1934, and 211 thereof were purchased between January 7, 1934, and August 11, 1934.

Sales of said bonds during said period were as follows:

Date	Number of Bonds
October 4, 1933	5
March 14, 1934	1
May 18, 1934	21

(Sworn to by Victor Osias on September 9, 1937.)

[fol. 97] In Supreme Court of New York, County of New York

Affidavit of Charles J. McKenna, Read in Support of Motion

State of New York,
County of New York, ss:

Charles J. McKenna, being duly sworn, deposes and says:

I am employed by Redmond & Company as Cashier and and familiar with the account of Mondiale Handels-Und Verwaltungs, A. G.

From September 18, 1933, to and including August 7, 1934, Mondiale Handels-Und Verwaltungs, A. G. purchased

through Redmond & Company a total of 27 bonds known as Bethlehem Steel Corporation First Lien & Refunding Mortgage, Series A, 5% Bonds, Due May 1, 1942; the par principal amount of each of said bonds as expressed in United States currency is $1,000; as expressed in Dutch guilders, is 2490 guilders; and as expressed in English pounds is £205.15.3 sterling.

The dates of purchase, and the number of bonds so purchased, as disclosed by said records, are as follows:

Date	Number of Bonds
September 18, 1933	2
October 11, 1933	1
October 16, 1933	2
[fol. 98] November 24, 1933	1
November 29, 1933	4
April 18, 1934	5
July 31, 1934	7
August 1, 1934	5

17 of said bonds were purchased between January 7, 1934 and August 11, 1934.

During said period there were no sales of said bonds through Redmond & Company by Mondiale Handels-Und Verwaltungs, A. G.

(Sworn to by Charles J. McKenna on September 9, 1937.)

In Supreme Court of New York, County of New York

Affidavit of Edwin R. Williams, Read in Support of Motion

State of New York,
County of New York, ss:

Edwin R. Williams, being duly sworn, deposes and says:

I am an Assistant Cashier of The Chase National Bank of the City of New York and am familiar with the account [fol. 99] of Anglo-Continentale Treuhand, A. G., Eschen, Liechtenstein, and also with the account of Anglo-Continentale Trust Maatschappij, Rotterdam, Holland.

The records of The Chase National Bank of the City of New York show that said bank is holding for the said Anglo-Continentale Treuhand, A. G., Eschen, Liechtenstein, certain bonds known as Bethlehem Steel Corporation First Lien & Refunding Mortgage, Series A, 5% Bonds, Due May 1, 1942, with November 1, 1937 and subsequent coupons attached.

The par principal amount of said bonds as expressed in United States dollars is $325,500; as expressed in Dutch guilders is 810,495. guilders; and as expressed in English pounds is £66,975-12-8.

Furthermore, the Chase National Bank, London, England, was holding as of August 17, 1937 and is still holding for account of Anglo-Continentale Trust Maatschappij, Rotterdam, Holland, certain of the aforesaid bonds of the par principal amount, as expressed in United States dollars, of $95,000, or, as expressed in Dutch guilders, 236,550. guilders, or, as expressed in English pounds, £19,547-8-8, which latter bonds are held by us in our trust department.

(Sworn to by Edwin R. Williams on September 9, 1937.)

[fol. 100] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

AFFIDAVIT OF CLEVELAND COBB, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Cleveland Cobb, being duly sworn, deposes and says:

I am an Assistant Secretary of The New York Trust Company. The said The New York Trust Company is holding for account of Pierson & Co., Amsterdam, Holland, certain bonds known as Bethlehem Steel Corporation First Lien & Refunding Mortgage, Series A, 5% Bonds, Due May 1, 1942, with November 1, 1937 and subsequent coupons attached.

The par principal amount of said bonds as expressed in United States dollars is $113,000; as expressed in Dutch guilders is 281,370 guilders; and as expressed in English pounds is £23,251.3.3.

(Sworn to by Cleveland Cobb on September 8, 1937.)

[fol. 101] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

AFFIDAVIT OF HARRY HOFFMAN, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Harry Hoffman, being duly sworn, deposes and says:

This supplemental affidavit is made in support of plaintiffs' motion fo. summary judgment herein.

I am in receipt of a cable from Arpad Plesch, the Managing Director of each of the plaintiffs herein, a copy of which is attached to this affidavit, marked Exhibit A, and made a part hereof as if herein fully set forth at length.

The reason why this affidavit is made at this time is that the matter referred to therein is suggested by defendant's brief; and the reason this affidavit is made by me and not by plaintiffs is that plaintiffs are foreign corporations, and have no office for the transaction of business within the United States; there is no officer or agent of plaintiffs within the United States and there is not sufficient time to prepare and forward an affidavit to the said Arpad Plesch in time to receive the return thereof upon the argument of this motion.

[fol. 102] I am also in receipt of the following cable from Pierson & Co., of Amsterdam, Holland:

[RCA RADIOGRAM]

"37 SEPT 8 AM 6 53
D 311

"PCT/SE HLK354

AMSTERDAM 11 8 12480

LC HOFFATTY NYK

HOLDING ACCOUNT MONDIALE 113000 BETH-STEELBONDS DEPOSITED NYTRUSTCO

PIERSONCO"

(Sworn to by Harry Hoffman on September 8, 1937.)

EXHIBIT "A", ANNEXED TO AFFIDAVIT OF HARRY HOFFMAN

[COMMERCIAL CABLES]

DEL2144 SEP 837

PC121 LIDOEXCELSIORPO 176 FST 50 8 1900
NLT HOFFATTY NYK /

FOR USE ON MOTION BEFORE JUSTICE HOFSTADTER I SUPERVISED BETHSTEEL PURCHASES ACCOUNT ALL PLAINTIFFS STOP FOR CONVENIENCE AND INTERCORPORATE FINANCING PUR-
[fol. 103] CHASES SOMETIMES MADE IN NAME OF ONE PLAINTIFF AS AGENT AND BROKER FOR ANOTHER STOP MONDIALE AND HYDROPRESS HAVE PLEDGED AND DEPOSITED BONDS WITH TREUHAND AND MAATSCHAPPIJ WHICH IN TURN REPLEDGED AND DEPOSITED SAME ALSO PLEDGING AND DEPOSITING THEIR OWN BONDS STOP PRINCIPAL PURCHASES WERE PRIOR TO AUGUST 1934 STOP AS FIRST LETTER BY BETHLEHEM IN JANUARY 1934 ANNOUNCED UNCONDITIONAL PAYMENT TO FOREIGN HOLDERS AND CONDITIONS WERE FIRST IMPOSED BY BETHLEHEM ONLY IN AUGUST 1934 OBVIOUSLY THOSE PURCHASES COULD NOT HAVE BEEN AND WERE NOT MADE BY PLAINTIFFS WITH INTENT EVADE JOINT RESOLUTION SINCE UNTIL THAT DATE BETHLEHEM CONCEDES ITS INAPPLICABILITY STOP PURCHASES BETWEEN JANUARY AND AUGUST WERE MADE IN RELIANCE ON JANUARY LETTER STOP ALTHOUGH I CONSIDER JOINT RESOLUTION INAPPLICABLE TO ANY PURCHASES WHETHER BEFORE OR AFTER AUGUST 1934 NEVERTHELESS NO INTENT EVADE JOINT RESOLUTION EVEN ON ANY PURCHASES ALL BEING MADE TO PROTECT OBLIGATIONS IN CURRENCIES OTHER THAN DOLLARS

ARPAD PLESCH.

[fol. 104] In Supreme Court of New York, County of New York

Affidavit of William J. Brown, Read in Opposition to Motion

State of New York,
County of New York, ss:

William J. Brown, being duly sworn, deposes and says:

I am the Assistant Treasurer of the defendant Bethlehem Steel Company and am familiar with the financial affairs and records of the defendant.

The coupons upon which suit has been instituted are coupons that were detached respectively from coupon bonds of the defendant known as its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bonds, Series A, due May 1, 1942, which are hereinafter referred to as the First Lien and Refunding Bonds.

Said coupon Bonds are a part of an issue of the First Lien and Refunding Bonds of the face amount of $15,200,000 that were issued in 1912 to retire $6,428,000, face amount, of the Five-Year Six Per Cent. Sinking Fund Secured Gold Notes of the defendant, to provide funds for the acquisition of $2,668,000, face amount, of the First Extension Mortgage Five Per Cent. Gold Bonds of the defendant and to provide additional working capital. Said $15,200,000, face amount, of the First Lien and Refunding Bonds were a part of an [fol. 105] authorized issue of $50,000,000, face amount, thereof and were sold in the spring of 1912 by the defendant to Bethlehem Steel Corporation, a New Jersey corporation, and by the latter to a group of bankers. In the case of each sale said Bonds were sold for, and paid for, in United States dollars, and the sole consideration received by the defendant and by Bethlehem Steel Corporation for said Bonds was paid in United States dollars.

Said $15,200,000, face amount, of First Lien and Refunding Bonds so sold by the defendant and said Bethlehem Steel Corporation were offered to the public by the bankers on or about May 20, 1912, at 91½% of their principal amount in dollars, plus accrued interest. In offering said Bonds to the public, the bankers mailed or otherwise issued to prospective purchasers a letter wherewith they enclosed a cir-

cular describing said Bonds and a form of subscription for said Bonds. A photostatic copy of the letter, circular and form of subscription so mailed or otherwise issued by William Salomon & Co., who headed the banking group in the United States, to its prospective purchasers is attached hereto marked Exhibit A and hereby made a part hereof. Upon information and belief, similar letters and copies of the same circular were mailed or otherwise issued to prospective purchasers by others of the banking group in the United States, and said circular was published in the New York Evening Post on May 21, 1912, in the Wall Street Journal on May 21, 1912, and in the New York Evening Mail on May 22, 1912.

None of said letters nor said circular made any reference whatsoever to the payment of the said Bonds or of the [fol. 106] coupons attached thereto in anything except dollars, but, on the contrary, they expressly stated that the coupon Bonds of said issue were to be of the denominations of $1,000 and $500. Furthermore, the form of subscription bound the purchaser to take, not a given number of said Bonds, but a given face amount thereof expressed in dollars.

At the same time at which said $15,200,000 face amount of the First Lien and Refunding Bonds were being offered for sale in the United States by New York bankers, simultaneous but entirely separate and distinct offerings were being made in London by Messrs. Salomon & Co. and in Amsterdam by Messrs. Hope & Co. A photostatic copy of the circular issued by Hope & Co. in Amsterdam, together with a translation thereof, is attached hereto, marked Exhibit B and hereby made a part hereof.

The plants and properties of the defendant are located in the United States and the defendant is not engaged in business outside of the United States and does not in the normal course of its business have guilders available in Amsterdam or pounds available in London with which to pay the coupons of said bonds.

The affidavit of Arpad Plesch in support of the motion for summary judgment does not deny the allegation in paragraph 63 of the amended answer that no "ownership certificates" were filed in respect of the bonds and coupons referred to in this action. It appears from Exhibits A to L annexed to plaintiff's motion papers on this motion that, with respect to each demand for payment of coupons Hope [fol. 107] & Co. declined payment upon the grounds, among

others, that the coupons were not accompanied by American ownership certificates.

Regulation 77 of the United States Treasury Department, Bureau of Internal Revenue, approved by the Secretary of the Treasury on February 10, 1933, and in effect until February 11, 1935, provided as follows with respect to ownership certificates:

"Art. 765. *Ownership certificates for bond interest.*—The owners (except domestic and resident foreign corporations) of bonds or other obligations containing a tax-free covenant, issued by a domestic corporation, a resident foreign corporation, or a nonresident foreign corporation having a fiscal agent or a paying agent in the United States, when presenting interest coupons for payment shall file an ownership certificate for each issue of bonds, showing the name and address of the debtor corporation, the name and address of the owner of the bonds, a description of the obligations, the amount of interest and its due date, the rate at which tax is to be withheld, and the date upon which the interest coupons were presented for payment. However, ownership certificates need not be filed by a non-resident alien, a partnership composed in whole of nonresident aliens, or a nonresident foreign corporation in connection with interest payments on such bonds were similar obligations of a domestic or resident foreign corporation qualifying under section 119(a)(1)(B) or of a nonresident foreign corporation. In [fol. 108] case of interest on corporate bonds or similar obligations not containing a tax-free covenant, issued by a domestic or resident foreign corporation, other than a corporation, qualifying under section 119(a) (1) (B), ownership certificates are required if the owner of such bonds is a nonresident alien, a nonresident partnership composed in whole or in part of nonresident aliens, or a nonresident foreign corporation. Ownership certificates are required in the case of such bonds, whether or not containing a tax-free covenant, if the owner is unknown to the withholding agent. * * *

"When interest coupons detached from corporate bonds are received unaccompanied by ownership certificates, unless the owner of the bonds is known to the first bank to which the coupons are presented for payment, and the bank is satisfied that the owner is a person who is not required to file an ownership certificate, the bank shall require of the payee a statement showing the name and address of the per-

son from whom the coupons were received by the payee, and alleging that the owner of the bonds is unknown to the payee. Such statement shall be forwarded to the Commissioner with the monthly return on Form 1012. The bank shall also require the payee to prepare a certificate on Form 1001 crossing out 'owner' and inserting 'payee' and entering the amount of the interest on line 3, and shall stamp or write across the face of the certificate 'statement furnished,' adding the name of the bank.

* * * * * * *

[fol. 109] "Art. 767. *Form of certificate for nonresident aliens, nonresident foreign corporations, and unknown owners.*—For the purpose of article 765, Form 1001 shall be used in connection with interest payments on bonds, regardless of whether or not such bonds contain a tax-free covenant, (a) by nonresident aliens (individual or fiduciary), (b) by nonresident partnerships composed in whole or in part of nonresident aliens, (c) by nonresident foreign corporations, and (d) where the owner is unknown."

Regulations 86 of the United States Treasury Department, Bureau of Internal Revenue, which were approved by the Secretary of the Treasury on February 11, 1935 (prior to the earliest presentment of coupons in this case) provide as follows with respect to ownership certificates:

"Art. 143-5. *Ownership certificates for bond interest.*—In accordance with the provisions of section 147. (b), citizens and resident individuals and fiduciaries, resident partnerships and nonresident partnerships all of the members of which are citizens or residents, owning bonds, mortgages, or deeds of trust, or other similar obligations issued by a domestic corporation, a resident foreign corporation, or a nonresident foreign corporation having a fiscal agent or a paying agent in the United States, when presenting interest coupons for payment shall file ownership certificates for each issue of such obligations regardless of the amount of the coupons.

[fol. 110] "In the case of interest payments on overdue coupon bonds, the interest coupons of which have been exhausted, ownership certificates are required to be filed when collecting the interest in the same manner as if interest coupons were presented for collection.

"In all cases where the owner of bonds, mortgages, or deeds of trust, or other similar obligations of a corporation is a nonresident alien (individual or fiduciary), nonresident partnership composed in whole or in part of nonresident aliens, nonresident foreign corporation, or where the owner is unknown, an ownership certificate for each issue of such obligations shall be filed when interest coupons for any amount are presented for payment. The ownership certificate is required whether or not the obligation contains a tax-free covenant. However, ownership certificates need not be filed by a nonresident alien, a partnership composed in whole of nonresident aliens, or a nonresident foreign corporation in connection with interest payments on such bonds, mortgages, or deeds of trust or other similar obligations of a domestic or resident foreign corporation qualifying under section 119 (a) (1) (B), or of a nonresident foreign corporation.

"The ownership certificate shall show the name and address of the debtor corporation, the name and address of the owner of the obligations, a description of the obligations, the amount of interest and its due date, the rate at which tax is to be withheld, and the date upon which the [fol. 111] interest coupons were presented for payment.

* * * * * * *

"When interest coupons detached from corporate bonds are received unaccompanied by ownership certificates, unless the owner of the bonds is known to the first bank to which the coupons are presented for payment, and the bank is satisfied that the owner is a person who is not required to file an ownership certificate, the bank shall require of the payee a statement showing the name and address of the person from whom the coupons were received by the payee, and alleging that the owner of the bonds is unknown to the payee. Such statement shall be forwarded to the Commissioner with the monthly return on Form 1012. The bank shall also require the payee to prepare a certificate on Form 1001, crossing out 'owner' and inserting 'payee' and entering the amount of the interest on line 3, and shall stamp or write across the face of the certificate 'Statement furnished,' adding the name of the bank.

* * * * * * *

'ART. 143—7. *Form of certificate for nonresident aliens, nonresident foreign corporations and unknown owners.*— For the purpose of article 143—5, Form 1001 shall be used in preparing ownership certificates (a) of nonresident aliens (individual or fiduciary), (b) of nonresident partnerships composed in whole or in part of nonresident aliens, (c) of nonresident foreign corporations, and (d) where the owner is unknown."

[fol. 112] The same provisions, with certain immaterial changes, were included in Articles 143—4 and 143—6 of Regulations 94 (approved by the Acting Secretary of the Treasury November 12, 1936). Upon information and belief, each of the plaintiffs in this action has at all times since January 1, 1934, been a non-resident foreign corporation within the meaning of Regulations 77, 86 and 94 and defendant had been a domestic corporation not qualified under Section 119(a) (1) (B) of the Revenue Act of 1932 or 1934.

A copy of Form 1001, referred to in the above Regulations and prescribed by the Treasury Department for use at all times between July, 1934, and July, 1936, and a copy of Form 1001 as revised in July, 1936, are annexed hereto as Exhibits C and D, respectively, and made a part hereof.

(Sworn to by Wm. J. Brown on May 22, 1937.)

[fol. 113] EXHIBIT "A" ANNEXED TO AFFIDAVIT OF WM. J. BROWN

William Salomon & Co.,
Bankers,
25 Broad Street New York
Chicago, 105 So. La Salle Street
Cable Address, Wilsal
Lieber's Code Used

May 20, 1912.

New Issue

$15,200,000 Bethlehem Steel Co. First & Refunding Mortgage 5% Bonds to Yield about 5.60%.

DEAR SIR:

With associates we are offering for public subscription at 91½ and accrued interest the above bonds, of which the

majority has already been sold. Subscription lists will be opened on Thursday, May 23, at 10 a. m. and closed at 3 p. m., or earlier on the same day. For additional details of the offering and a brief description of the bonds we refer you to the enclosed circular.

In offering these bonds we would emphasize the substantial progress of the Bethlehem Steel Co. under the present management. In the last six years the gross business has more than doubled according to official statements, being reported in 1905 at $14,554,117 and in 1911 at $30,093,022. The prosperity of the company at the present time is attested by its report of orders booked during the first quarter [fol. 114] of 1912, aggregating about $12,250,000, or at the rate of nearly $50,000,000 per annum.

A simultaneous offering will be made abroad in London, England, by Messrs. Salomon & Co., and in Amsterdam, Holland, by Messrs. Hope & Co., thus assuring an international market. In this country subscriptions will be received in the principal financial centres by well-known houses. In Pennsylvania the bonds have the advantage of being tax-exempt, which is an important feature in that market.

In view of the large amount already sold, as above stated, we would suggest that subscriptions be telegraphed by intending subscribers whose applications cannot be mailed in time to be in our hands Thursday morning.

Yours truly, William Salomon & Co.

Li.A.
Enclosure.

[fol. 115] ——, 1912.

Messrs. William Salomon & Co., 25 Broad Street, New York.

GENTLEMEN:

I

We herewith subscribe for $— face amount Bethlehem Steel Company First Lien and Refunding Mortgage 5% Thirty Year Gold Bonds in accordance with the terms of your prospectus dated May 21st, 1912.

Yours truly,

Signature, ...

Name in full, ...

Address in full, ...

[fol. 116]

William Salomon & Co.

Bankers

25 Broad Street, New York

Chicago, 105 So. La Salle Street

Cable Address, Wilsal

Lieber's Code Used

$15,200,000

Bethlehem Steel Company

First Lien and Refunding Mortgage Five per Cent Thirty Year Gold Bonds

Principal and Interest Guaranteed by Endorsement on Each Bond by Bethlehem Steel Corporation

Principal Payable May 1, 1942

Interest Payable May 1 and November 1

Coupon Bonds of $1,000 and $500 Denominations with Full Privileges of Registration

Coupon and Registered Bonds Interchangeable

Annual Sinking Fund of 2½ per Cent of the Face Value of Bonds of this Issue Outstanding With Minimum Sinking Fund Limit of $300,000 per Year

All or any part of the issue redeemable at the option of the Company at 105% and accrued interest on any interest date upon twelve weeks' notice.

Equitable Trust Company of New York, Trustee

Free of Tax in Pennsylvania

Attention is directed to the within summary, prepared by Mr. C. M. Schwab, President of Bethlehem Steel Corporation, of his more detailed letter, dated May 8, 1912, de-
[fol. 117] scribing this issue of bonds. Copies of detailed letter will be furnished on request.

Application will be made to list this issue on the New York Stock Exchange and, if deemed desirable, on one or more Foreign Exchanges.

Temporary Certificates, exchangeable later for Engraved Bonds, are now ready for delivery.

The form of bonds, the creation of the mortgage and all legal proceedings connected therewith are to be approved by our counsel, Messrs. Simpson, Thacher & Bartlett.

Having placed a large amount of this issue here and in Europe, we will receive subscriptions for the unsold balance, at 91½ and Accrued Interest.

The subscription will be opened on Thursday, May 23rd, 1912, at 10 o'clock A. M. and closed at 3 o'clock P. M. the same day or earlier at the option of the undersigned. The right is reserved to reject any application and to allot a smaller amount than applied for. Payment in full to be made upon allotment. Subscription blanks may be obtained from the undersigned.

A simultaneous issue will be made by Messrs. Salomon & Co., London, and by Messrs. Hope & Co., Amersterdam, Holland.

Hallgarten & Co.,
5 Nassau Street,
New York.

Harvey Fisk & Sons,
62 Cedar Street,
New York.

William Salomon & Co.,
25 Broad St.
New York.

105 So. La Salle St.
Chicago.

New York, May 21, 1912.

[fol. 118] The following is a summary, prepared by Mr. C. M. Schwab, President of Bethlehem Steel Corporation of his letter dated May 8, 1912, describing this issue of bonds.

"Purposes of Issue:

The proceeds of the $15,200,000 bonds sold to you, in conjunction with Messrs. Kuhn, Loeb & Co., New York, are to be used:

To retire the entire outstanding amount of $6,428,000 Bethlehem Steel Company Five-Year Six Per Cent. Secured Gold Notes.

To purchase $2,668,000 Bethlehem Steel Company First Extension Mortgage 5% Bonds, thereby reducing the outstanding amount of that issue to $8,000,000.

To provide additional working capital.

$2,300,000 bonds remain in the treasury for the general purposes of the Company, and the balance of the author-

ized issue of $50,000,000 Bonds is to be reserved under carefully drawn restrictions of the mortgage for refunding the $8,000,000 First Extension Mortgage 5% Bonds, and for construction or acquisition of additional property at not exceeding 90% of its cost, with limitations in issuing bonds for the latter purpose, having reference to net earnings of the Bethlehem Steel Corporation.

Lien of the Mortgage:

Bonds of this issue will be secured by a mortgage upon the real estate and manufacturing plants of the Bethlehem Steel Company, subject only to its Purchase Money Mort-
[fol. 119] gage, ($7,500,000 outstanding), and its First Extension Mortgage, ($8,000,000, as above shown, outstanding, for the retirement of which a sufficient amount of bonds of this issue will be reserved).

These bonds will also be secured by a first mortgage lien upon real estate and manufacturing plants hereafter acquired by the Bethlehem Steel Company, subject only to the after acquired property clauses of the First Extension Mortgage, (so far as applicable), and to any purchase money or other mortgages subject to which such property may be acquired, but against which an equal face amount of bonds of this issue shall be reserved.

Value of Assets Back of Bonds:

Upon the issue of $15,200,000 bonds sold, the assets of the Bethlehem Steel Company over and above its other liabilities, including its prior mortgages above referred to, will be $25,880,758, and the value of other properties represented by stocks to be pledged to secure the guaranty of Bethlehem Steel Corporation will be $6,766,869, making a total of $32,647,627 of assets back of these First Lien & Refunding Mortgage Bonds, or more than double the amount sold at this time. To the above values of properties represented by stocks pledged about $28,000,000 should be added to represent the real worth of mining properties of the Corporation.

Earnings:

The accounts of the Bethlehem Steel Corporation and its Subsidiary Companies have been audited annually from the
[fol. 120] date of incorporation to the close of the last fiscal

year by Messrs. Price, Waterhouse & Co., and the statements of earnings which follow are based upon the audited accounts.

On the basis of net earnings of the Corporation for 1911, before providing for depreciation or for exploitation and exhaustion of minerals, there is available, after the payment of all charges including amortization on prior issues, $3,826,618 with which to meet the interest charges on these $15,200,000 First Lien & Refunding Mortgage Bonds. This is over Five Times the amount so required and over Three Times the amount of the entire charges on these bonds, including Sinking Fund and amortization.

In General:

The Bethlehem Steel Corporation is one of the most important and successful of the independent steel companies. Its growth and progress have been consistent and steady since its incorporation. Its annual business in 1905 was $14,554,117; in 1911 it was $30,093,022. During the first quarter of 1912 it booked orders aggregating about $12,250,000. Total orders on hand March 31, 1912, about $21,000,000.

The plants are modern and up to date in all particulars and are maintained in a high state of efficiency and repair, as is evidenced by the expenditure or appropriation of $13,608,628 out of earnings, during the last five years, for this purpose.

The Bethlehem Steel Corporation is well rounded out and self-contained, and occupies an independent position with [fol. 121] ample supplies of ore, coal and other raw materials which it either owns or controls."

Copy of letter from Mr. C. M. Schwab, President of the Bethlehem Steel Corporation, giving further information regarding this issue will be furnished on request.

Hallgarten & Co.,
5 Nassau Street,
New York.

Harvey Fisk & Sons,
62 Cedar Street,
New York.

William Salomon & Co.,
25 Broad St.
New York.

105 So. La. Salle St.
Chicago.

EXHIBIT "B", ANNEXED TO AFFIDAVIT OF WM. J. BROWN

[So much of Exhibit "B" as consists of a photostatic copy of a circular in the Dutch language, of which the following portion of Exhibit "B" is a certified translation, is omitted in printing pursuant to stipulation and order printed herein on pages 130 to 132.]

Bethlehem Steel Company

Issue of $15,200,000, 5% First Lien and Refunding Mortgage, 30-year Gold Bonds redeemable on May 1, 1942

The payment of the principal and interest on these bonds is guaranteed by the Bethlehem Steel Corporation, this guarantee being printed on each bond.

Trustee for the Loan: Equitable Trust Company of New York

[fol. 122] This issue is part of an authorized loan amounting to $50,000,000, $17,500,000 of which, including the amount now to be issued, shall be outstanding.

The bonds are issued in the form of Bearer Certificates of $1000. and $500. and these bonds, as to principal and as to interest, may be changed into Registered Certificates, while Registered Certificates may in turn be exchanged for Bearer Bonds.

The loan is redeemable on May 1, 1942 but, at the option of the Company, may be redeemed on any interest payment date in whole or in part at 105% plus the current interest provided notice has been given thereof 12 weeks in advance. The bonds carry semi-annual coupons maturing on May 1st and November 1st.

Principal and interest are payable in New York in gold coin of the United States of or equal to the present standard of weight and fineness, and in Amsterdam at the fixed rate of exchange of guilders 2.49 per dollar without deduction of any tax which the Company may have to pay thereon, or deduct therefrom, in accordance with any existing or future law of the United States of America or of any state, county or municipality thereof.

A sinking fund shall be formed in which there shall be set aside every year 2½% of the bonds outstanding at such time, which, however, shall never be less than $300,000.

On basis of the net receipts of the Company for the fiscal year 1911, an amount of $3,826,618 as interest on the $15,200,000. First Lien & Refunding Mortgage Bonds remains available before taking into consideration write-offs and depletion of the ore mines, but paying all fixed charges includ-
[fol. 123] ing the charges required for the servicing of the Sinking Fund on the previous loans. This amount represents therefore, more than 5 times the amount required for this interest and more than 3 times the amount of all charges on these bonds including the cost of the Sinking Fund servicing.

The proceeds from these $15,200,000 bonds shall be applied as follows:

For the withdrawal of the entire outstanding amount of $6,428,000 Bethlehem Steel Company, 5-years, 6% Insured Gold Bonds;

For the purchase of $2,668,000 Bethlehem Steel Company, 5% First Extension Mortgage bonds whereby the outstanding amount of these bonds is reduced to $8,000,000, and

For the obtaining of further operating capital.

Of these bonds, $2,300,000 shall remain in portfolio for the general use of the Company, while the remaining bonds may only be issued, subject to the limitations set forth in detail in the Mortgage Deed, governing the withdrawal of the remaining $8,000,000—5% First Renewal Mortgage Bonds and for new construction work or for the obtaining of further properties with the stipulation that the amount of the bonds to be issued for this purpose shall not represent more than 90% of the cost price and shall be subject to special stipulations in regard to the receipts.

Messrs. Hope & Co. report that on Tuesday May 21, 1912 until 4 P. M., at the office of Messrs. Van Looan & Co., sub-
[fol. 124] scription shall be open for the above-mentioned loan at the price of 90¾% (the dollar calculated at Dutch Guilders 2.50).

In case of over-subscription, the allotment shall be effected in equivalent proportions as far as possible.

Payment must be made on June 1, 1912 plus one month's interest at the rate of 5% per annum.

Messrs. Hope & Co. shall issue receipts, which shall be exchanged as quickly as possible and without charge, for the

final bonds, bearing coupons maturing on November 1, 1912 and on the following months.

The right to refuse subscriptions is reserved.

Subscriptions to this loan shall also be open in New York, at the offices of Messrs. Hallgarten & Co., Harvey Fisk & Sons, and William Salomon & Co.

In London, at the offices of Salomon & Co.

For further particulars regarding these bonds, reference may be had to the translation of a letter of the President of the Bethlehem Steel Corporation appearing on the back hereof.

Amsterdam, May 17, 1912.

[fol. 125] Certificate of Accuracy

STATE OF NEW YORK,
County of New York, ss:

Translation from The Netherland Language

On this day personally appeared before me Mr. Maarschalk who, after being duly sworn, deposes and states:

That he is a translator of the Netherland Language and English languages by profession and as such connected with the Lawyers' & Merchants' Translation Bureau:

That he is thoroughly conversant with these languages;

That he has carefully made the attached translation from the original document written in the Netherland language, (on the official paper of the Lawyers' & Merchants' Translation Bureau); namely from the prospectus of Hope & Co., dated May 17, 1912, re: the first Lien and Refunding 5% Mortgage Bonds of the Bethlehem Steel Co.

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

(Sworn to by Mr. Maarschalk on December 27, 1934.)

(Here follow two photolithographs, side folios 126 and 127)

EXHIBIT "C," ANNEXED TO AFFIDAVIT OF WM. J. BROWN

FORM 1001
Treasury Department
Internal Revenue Service
Revised July 1934

OWNERSHIP CERTIFICATE

TO BE USED BY A NONRESIDENT ALIEN, A FOREIGN PARTNERSHIP OR CORPORATION
In Connection with Interest on Bonds of a Domestic or Resident Corporation

DEBTOR CORPORATION	OWNER OF BONDS (Print name)
NAME	NAME .....
ADDRESS	STREET .....
NAME OF BOND	CITY ..... COUNTRY .....

Date interest due on bonds ..... Date paid .....

I certify that to the best of my knowledge and belief the information entered hereon is correct.

.....
(Signature of owner, trustee, or agent)

.....
(Address of trustee or agent)

.....
(Fiduciaries must disclose the name of estate or trust)

Owner	With tax-free covenant and issued before January 1, 1934		Without tax-free covenant or issued on or after January 1, 1934, with tax-free covenant deduct	
	If corporation assumes over 2% of the tax	If corporation assumes not over 2% deduct		
1. Nonresident alien individual, fiduciary, or partnership	$.....	2% $.....	4% $.....	
2. Corporation having no office or place of business in United States	$.....	11¼% $.....	13¾% $.....	
3. Unknown	$.....	2% $.....	4% $.....	

NOTE.—If you discover at the close of the year that your total income including dividends from sources within the United States does not exceed $5,000 and, exclusive of such dividends, is less than the personal exemption of $1,000 you should prepare, not later than May 1 of the following year, an exemption certificate on Form 1002 and forward it to the corporation which issued the bonds.

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EXHIBIT "D", ANNEXED TO AFFIDAVIT OF WM. J. BROWN

FORM 1001
Treasury Department
Internal Revenue Service
Revised July 1936

OWNERSHIP CERTIFICATE

TO BE USED BY A NONRESIDENT ALIEN, A FOREIGN PARTNERSHIP OR CORPORATION
In Connection with Interest on Bonds of a Domestic or Resident Corporation

DEBTOR CORPORATION	OWNER OF BONDS (Print name)
NAME.....	NAME.....
ADDRESS.....	STREET.....
NAME OF BOND.....	CITY..... COUNTRY.....

Date interest due on bond..... Date paid.....

I certify that to the best of my knowledge and belief the information entered hereon is correct.

.....
(Signature of owner, trustee, or agent)

.....
(Address of trustee or agent)

.....
(Fiduciaries must disclose the name of estate or trust)

Owner	With tax-free covenant and issued before January 1, 1934		Without tax-free covenant or issued on or after January 1, 1934, with tax-free covenant deduct
	If corporation assumes over 2% of the tax	If corporation assumes not over 2% deduct	
1. Nonresident alien individual, fiduciary, or partnership	$.....	8% $.....	10% $.....
2. Corporation having no office or place of business in United States	$.....	13% $.....	15% $.....
3. Unknown	$.....	8% $.....	10% $.....

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[fol. 128] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

AFFIDAVIT OF DONALD E. FORBES, *REAL* IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York, ss:

Donald E. Forbes, being duly sworn, deposes and says:

I reside at 64 West 11th Street, Borough of Manhattan, City of New York.

I am a practicing attorney of the Supreme Court of the State of New York, and I am associated with Cravath, de Gersdorff, Swaine & Wood, No. 15 Broad Street, New York, N. Y., attorneys for the defendant in the above-entitled action.

I have examined various issues of The Commercial and Financial Chronicle, which publishes weekly quotations of prices at which bonds are sold on the New York Stock Exchange, including the First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bonds of the defendant, Bethlehem Steel Company.

That the quotations so published for the said Bonds of the defendant on the dates hereafter mentioned are as follows:

June 9, 1933:

(ranging from 91⅛ to 93 for the week ending on that date)

[fol. 129] October 13, 1933: 102¾

(and ranging from 101 to 103 for the week ending on that date)

November 3, 1933: 100½

(and ranging from 99¾ to 101⅛ for the week ending on that date)

April 20, 1934: 112½

(and ranging from 111 to 113⅞ for the week ending on that date)

August 17, 1934: 110⅝

(and ranging from 110¼ to 111⅞ for the week ending on that date)

February 1, 1935:

(ranging from 110 to 111½ for the week ending on that date)

(Sworn to by Donald E. Fobes on May 22, 1937.)

In Supreme Court of New York, County of New York

Opinion by Mr. Justice Hofstadter

N. Y. L. J.—October 15, 1937

Anglo-Continentale Treuhand A. G. v. Bethlehem Steel Co.—Motion for summary judgment is granted. This court has already granted summary judgment on a similar state of facts. There is nothing contained in the recent decisions to warrant a result different from that reached by this court in the cases decided in June, 1936. Settle order.

[fol. 130] In Supreme Court of New York, Appellate Division, First Department

Stipulation and Order as to Papers Omitted in Printing

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following papers need not be printed and may be omitted from the printed papers on appeal from the judgment and order in the above-entitled action and that copies of each of the same may be handed up to the Court on the argument of this appeal, and may be referred to in the briefs and arguments with the same force and effect as though formally included in the printed papers on appeal:

(1) Exhibits A to L, inclusive, annexed to the affidavit of Arpad Plesch, sworn to May 17, 1937, in support of the motion for summary judgment, each of which is a photostatic copy of an exemplified certificate of protest, in the

Dutch language (sworn English translations of Exhibits C, E, F, G and H are also annexed as part of said five Exhibits, respectively) for nonpayment of coupons presented at Hope & Co., in Amsterdam, Holland, in each instance on behalf of one or another of the respective plaintiffs herein;

(2) So much of Exhibit B annexed to the affidavit of William J. Brown, sworn to May 22, 1937, in opposition to the [fol. 131] motion for summary judgment, as consists of a photostatic copy of a circular, in the Dutch language, issued by Hope & Co. in Amsterdam, Holland, and dated May 17, 1912, in respect of the issuance of Bethlehem Steel Company First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bonds; and

(3) Stipulation between the parties hereto, dated July 30, 1937, pursuant to which the plaintiffs have deposited their coupons (together with United States Treasury Department Ownership Certificates, Form 1001) with the Treasurer of Bethlehem Steel Corporation in New York, as recited in the order appealed from.

It is further stipulated and agreed by and between the attorneys for the respective parties hereto, that translations of two of the photostatic copies of the exemplified certificates of protest annexed, as Exhibits A to L, inclusive, to the affidavit of Arpad Plesch, sworn to May 17, 1937, in support of the motion for summary judgment, are generally in the forms annexed hereto as Schedule I and Schedule II and made a part hereof, with the blanks filled in as indicated by the words in brackets ([ ]) in said Schedule I and Schedule II; that said certificates of protest recite the presentation at Hope & Company in Amsterdam, Holland, of coupons, in each instance on behalf of one or another of the respective plaintiffs herein, of the various maturity dates and amounts and bearing the serial numbers as indicated in Schedule III annexed hereto and made a part hereof; that [fol. 132] Schedule IV annexed hereto and made a part hereof shows (1) the dates of the respective protests in behalf of the respective plaintiffs, (2) the face amount of the coupons as expressed in American dollars, (3) the face amount of the coupons as expressed in guilders, being also in each instance the amount demanded by or in behalf of the respective plaintiffs, and (4) the dollar amount awarded on plaintiffs' motion, including in the amount so awarded

the dollar value of the guilders involved in the protest fees; and that the aforesaid certificates of protest recite, in each instance, the presentation of said coupons, the demand for payment of said coupons in guilders on the dates and in the amounts, respectively, as indicated in said Schedule IV, and the payment of the protest fees in guilders in behalf of the various plaintiffs.

Dated, March 9, 1938.

Harry Hoffman, Attorney for Plaintiffs-Respondents. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Appellant.

So ordered. ——, F. M.

[fol. 133] Schedule I, Annexed to Stipulation as to Papers Omitted in Printing

Impressed Stamp 50 Cents

On the [day] of [month] in the year 1900 and [year], at the request of [in certain of the protests the particular plaintiffs and their addresses are set forth, and in other of the protests the name of a bank in Amsterdam with its address is set forth],

I, Johan Philip Christiaan Diederich Brinkman, bailiff to the Arrondissement Court of Justice, of and residing at Amsterdam, in the presence of the hereinafter mentioned witnesses, serving my writ and speaking with [name of individual], proxy of the firm of Hope & Co., established at Amsterdam, Keizersgracht No. 577/581,

Did summon that said firm immediately pay to me, bailiff, on behalf of requester as holder of the hereinafter mentioned coupons now due, in exchange for said coupons, the sum of [total face amount in guilders of coupons presented] being the total amount of [number] coupons of [face amount in guilders of each coupon], each belonging to the 5% bonds of the Bethlehem Steel Company for six months' interest due [maturity date of coupons], the coupons being numbered [serial numbers of coupons], whereupon the person to whom I spoke did respond

"Consequent on instructions from the Company, these coupons may only be paid in guilders when in addition to ownership certificates a specially formulated declaration is at the same time produced to the effect that the owner of the bonds has for the past six months been a bona fide resident

of a country other than the U. S. of America and 2nd that the bonds have since June 5th 1933 been the constant prop-
[fol. 134] erty of a bona fide resident of a country other than the U. S. of America."

And on being asked to sign this response did deem it unnecessary.
And not having obtained payment in guilders, I, bailiff, did charge the firm summoned with default, and have recorded the execution of this writ, of duly charging with default, of indemnification of all charges, losses and interests in accordance with the law, reserving on behalf of requester all further rights and actions in connection herewith.

Executed in the presence of [names of two witnesses], both acting in this instance outside the scope of their professions and residing at Amsterdam, as my witnesses, who together with me, have signed this writ in the original and in the copy left with the firm summoned by me, speaking as stated above.

The costs of this present are [number of guilders]

Sal. [number of guilders]
Exp. [number of guilders] Signed:—J. P. C. D. Brinkman,
Wit. [number of guilders] [Signatures of two witnesses]

[total number of guilders]

Registered at Amsterdam
this [day] of [month], 1900 and [year]
Vol. [number] Page [number] No. [number];
[number] pages; no alterations.
Fee received [number of guilders]

The Inspector
[signature]
Clerk.

Translation fee including legalization [amount indicated]

[fol. 135] Schedule II, Annexed to Stipulation as to Papers Omitted in Printing

Impressed Stamp 50 Cents

On the [day] of [month] in the year 1900 and [year], at the request of [in certain of the protests the particular plaintiffs and their addresses are set forth, and in other of the protests the name of a bank in Amsterdam with its ad-

dress is set forth], I, Johan Philip Christiaan Diederich Brinkman, bailiff to the Arrondissement Court of Justice, of and residing at Amsterdam, in the presence of the hereinafter mentioned witnesses, serving my writ and speaking with [name of individual], proxy of the firm of Hope & Co., established at Amsterdam, Keizersgracht No. 577/581, did summon that said firm immediately pay to me, bailiff, on behalf of requester as holder of the hereinafter mentioned coupons now due, in exchange for said coupons, the sum of [total face amount in guilders of coupons presented] being the total amount of [number] coupons of [face amount in guilders of each coupon], each belonging to the 5% bonds of the Bethlehem Steel Company for six months' interest due [maturity date of coupons], the coupons being numbered [serial numbers of coupons], whereupon the person to whom I spoke did respond

"that if the coupons are presented, accompanied by the declaration prescribed by the Bethlehem Steel Company, and an ownership certificate we are authorized to pay, in exchange for the coupons, the amount as stated on the coupons in Dutch currency";

And on being asked to sign this response did deem it unnecessary.

[fol. 136] And not having obtained payment in guilders, I, bailiff, did charge the firm summoned with default, and have recorded the execution of this writ, of duly charging with default, of indemnification of all charges, losses and interests in accordance with the law, reserving on behalf of requester all further rights and actions in connection herewith.

Executed in the presence of [names of two witnesses], both acting in this instance outside the scope of their professions and residing at Amsterdam, as my witnesses, who together with me, have signed this writ in the original and in the copy left with the firm summoned by me, speaking as stated above.

The costs of this present are [number of guilders]

Sal. [number of guilders]
Exp. [number of guilders] Signed:—J. P. C. D. Brinkman,
Wit. [number of guilders] [Signatures of two witnesses].

[total number of guilders]

Registered at Amsterdam
the [day] of [month], 1900 and [year]
Vol. [number] Page [number] No. [number];
[number] pages; no alterations.
Fee received [number of guilders]

The Inspector
[signature]
Clerk.

Translation fee including legalization [amount indicated]

[fol. 137] Schedule III, Annexed to Stipulation as to Papers Omitted in Printing

Numbers preceded by the letter "M" are the serial numbers of coupons in the face amount of $25, or £5.2.10, or 62.25 guilders, and numbers preceded by the letter "D" are the serial numbers of coupons in the face amount of $12.50, or £2.11.5, or 31.13 guilders.

Plaintiff Anglo-Continentale Treuhand, A. G.

5—Coupons maturing on May 1, 1935:

M6488	M6625	M8680	M8703	M17728

167—Coupons maturing on November 1, 1935:

M6488	M15553	M11370	M3301	M16961
6625	15617/8	11180	3218	16951
8680	15633/4	14376	2758	16974
8703	15645	14307	2228/9	17785
17728	15720	14236	1667	17260
16390	15758	11084	13656/8	17194
16564/5	15764/6	10907	17846	17161
16799	15791/3	9484	17873	17136
14470	15828	9420	17916	17120
14481	15881	9378	17832	19139
14569	15896	7813	17830	19127
14587	15929	7330/1	17449	19069
14779	16011	6266	17415	19036
14831	16053	6218	17318	19006/8
14834	16110	5952	17269	18970
14920/2	16176	5788	17263	18909
14924/5	16181	5879/0	18444	18542
15044/5	16186	5024	17833	19306
15074	16199	4941	18460/1	19275
15232	16226	4671	18486	19180
15252	16352/3	4664	17458	19154
15289/92	13487	4148	17723/5	19142
15362	13399	4087	17729	16975
15409/11	12615	3273	17826/9	16985
15477	11639	3471/2	16813	17016
15516/21	11373	3457	16923	17084
				17086

Plaintiff Anglo-Continentale Treuhand, A. G.—Continued

[fol. 138]

30—Coupons maturing on November 1, 1935:

D267	D132	D2885	D2134	D1664
386	1265	2792	2136	1517
622/3	2973/4	2653	1811	1456
951/2	2945	2583/4	1808	1269
1260/1	2889	2495/6	1803	

209—Coupons maturing on May 1, 1936:

M1472	M13648	M15246	M17120	M14307
2428	14577	15363	15553	15720
2983	14605/6	15638	5880	16961
3808	17194	15826	17136	15232
6875	19006/7	16357	19069	17084
7596	17318	16593	17449	16011
7812	17723/4	16814	17916	15791/3
8134	9420	16824	19275	19180
8623	7330/1	17409	15618	15044/5
M12603	M16053	M17448	M19253	M14920/2
12769	5024	18452	18463	17458
12775	13487	19334	18931	15645
13215	14923	19344	19019	17785
13233	14926/7	19222	19219	18444
2758	17016	18460/1	6218	17729
16176	2229	2228	19008	15401
12615	9378	17725	16564/5	1541
11639	15633	15252	5879	1600
3273	18970	15520/1	4148	1767
16181	15362	15409	18542	1950
17161	17873	15517	15634	2136
15074	14779	15410/1	9484	2795
15617	19306	17846	14831	3966
15896	18909	15929	19154	2094
17826/8	16951	15881	17415	961
17832/3	17829	15518/9	14569	588/9
16199	17263	16110	15828	6429/33
16200	15516	15758	19142	6488
19139	19036	16352/3	16186	6625
19127	14925	16390	3301	8680

[fol. 139]

14587	14376	10907	4087	8703
14236	15289/90	17260	3457	10643
15766	15764/5	17269	16813	10958
15477	6266	17830	16923	11316
14924	18486	11180	17086	
16799	14470	14834	16985	
13399	11084	14481	16974/5	

Plaintiff Anglo-Continentale Treuhand, A. G.—Continued

40—Coupons maturing on May 1, 1936:

D2973/4	D1314	D622/3	D2583/4	D1427/8
2653	2652	951/2	2134	278
2889	1456	2765/6	2136	186
2885	1664	2933	2792	291
132	1517	1260/1	2936	344
2945	1269	1808	2969	380
267	386	1803	2453	
2495/6	1265	1811	1436	

Plaintiff Anglo-Continentale Trust Maatschappij

151—Coupons maturing on November 1, 1934:

M15633/4	M11639	M17136	M15720	M15362
15617/8	12615	17120	15645	15252
15521	13487	17086	16199	15232
15553	13399	17016	16186	15074
15518/9	14236	17084/5	16181	15044/5
15520	16974/5	19142	16176	14924/5
3457	16961	19139	16110	14920/2
3301	16951	19127	15929	14834
3273	16923	19069	16011	14831
2758	16813	19036	16053	14779
2228/9	19306	18970	15896	584
4148	19275	18909	15881	684/6
4087	19180	18542	14587	753
5879	19154	18486	14569	758
5024	17785	18444	14481	770
M6218	M17729	M17916	M14470	M840
M5880	17723/5	17873	14307	845

[fol. 140]

6266	17458	17846	16799	919
7330/1	17449	17832/3	16390	3966
9378	17415	17830	16352/3	2795
9420	17318	17826/9	16226	2136
9484	17269	15828	15516/7	1950
10907	17263	15791/3	15477	1767
11084	17260	15764/6	15410/1	1600
11180	17161	15758	15409	1541

26—Coupons maturing on November 1, 1934:

D623	D267	D2792	D1808	D1269
622	2885	2583/4	1811	1265
951	2889	2134	1664	1260/1
952	2973/4	2136	1517	
386	2653	1803	1456	

Plaintiff Anglo-Continentale Trust Maatschappij—Continued.

212—Coupons maturing on May 1, 1935:

M19036	M17826/9	M18460/1	M11639	M16181
19006/8	16974/5	14779	12615	16186
18970	16961	14831	13399	16199
18909	16951	14834	13487	16226
19306	16923	14920/2	13656/8	16352/3
19275	17458	14924/5	6218	16390
19180	17449	9484	6266	16564/5
19154	17415	10907	7330/1	16799
17785	17318	11084	7813	16813
17729	17269	14236	9378	1667
17723/5	18444	14307	9420	2228/9
17832	17916	14376	3457	2758
19142	17873	14470	3471/2	3218
19139	17846	14481	4087	3273
19127	17833	14569	4148	3301
19060	17120	14587	4664	15766
17263	17086	5879	4671	15791/3
17260	17084	5880	4941	15828
17194	17016	5952	5024	15881
17161	16985	11370	5788	15896
17136	18542	11180	16110	15929

[fol. 141]

17830	18486	11373	16176	16011
16053	15520/1	15256	7332	753
15765	15044/5	13551	7267	684/6
15764	15074	13547/8	6621	584
15758	15232	13228	6564	19387
15720	15252	13016	5748	19221
15645	15289	11877	5399	19158
15633/4	15290/2	11873	4429	19150
15617/8	15362	11374	2121	19143
15553	16984	11208	919	18992
15409	16639	9433	844/5	18386
15410/1	15922	9423/4	840	17847/8
15477	15800	8620	770	17734
15516/9	15401	8578	758	17182

30—Coupons maturing on May 1, 1935:

D2974/3	D2653	D1811	D1456	D623/2
2945	2584/3	1808	1269	386
2889	2496/5	1803	1265	267
2885	2136	1664	1261/0	132
2792	2134	1517	952/1	

Plaintiff Mondiale Handels-Und Verwaltungs, A. G.

37—Coupons maturing on November 1, 1934:

M19344	M14577	M15826	M16357	M18452
12775	14605/6	7596	8134	18463
12789	14923	16593	7812	18931
8623	2428	16814	16824	19019
13215	3808	14926/7	19219	19334
13233	6875	15246	17409	19253
13648	15638	15363	17448	19222

16—Coupons maturing on November 1, 1934:

D2999	D2933	D2652	D1010	D841/2
2969/70	2765	2573	949/50	507
2936	2766	1009		

[fol. 142]

57—Coupons maturing May 1, 1935:

M11539/8	M9230/1	M18452	M14923	M18498/9
16718	15363	2983	14605/6	16824
6431	15826	13648	14926	19334
7596	19253	13233	17448	17452
3808	9332	18463	15892/3	12603
2428	19219	18931	19344	7812
8623	14927	19222	12769	14577
6875	15638	12775	18484/5	16357
8134	15246	13215	17409	16593
4076	16814	5457	7782	
1472	19019			

20—Coupons maturing May 1, 1935:

D411	D2969	D2936	D2933	D2970
344	412	950/49	2765	1010/9
389	507	841	2766	2573
2999	842	2652		

98—Coupons maturing November 1, 1935:

M14605/6	M16718	M19344	M6875	M12694/6
14833	16806	19334	7162	12769
14923	16814	588/89	7596	12775
14926/7	16824	961	7782	13073
14928	16874	1472	7812	13215
15246	17013	2094	8134	13233
15359	17068	2428	8196	13648
M15363	M17170	M2983	M8198	M14577
15569/71	17409	3808	8623	18931
15638	17448	4076	8685	19017
15826	17452	4248	8686/90	19019
15831	18452	5457	9330/32	19205
15834	18463	5459	9701	19219
15892/3	18484/5	5600	11451	
16317	18498/9	5813/14	11538	
16357	19222	6327	11539	
16593	19253	6549	12603	

Plaintiff Mondiale Handels-Und Verwaltungs, A. G.—Continued

[fol. 143]

22—Coupons maturing November 1, 1935:

D201	D507	D1009/10	D2765/66	D2969/70
344	841	1314	2933	2999
380	842	2573	2936	
411/12	949/50	2652		

64—Coupons maturing May 1, 1936:

M19052	M13484	D6549	M11539	M15892/93
19120	18498	7162	12694/96	16032/34
19205	19017	7782	13073	16317
19208	4076	8196	14833	16626
19316	4248	8198	14928	16718
17170	5457	8685/90	15221	16806
17722	5459	9330/32	15359	16874
18485	5600	9701	15569/71	17013
18499	5813/14	11451	15831	17068
17452	6327	11538	15834	

12—Coupons maturing May 1, 1936:

D411/12	D841/2	D1009	D2573	D2999
507	949/50	1010	2970	

Plaintiff Hydropress Handels, A. G.

8—Coupons maturing May 1, 1935:

M 6429/30	M10643	M10958	M11316	M17170
6432/3				

4—Coupons maturing May 1, 1935:

D186	D1427/8	D1436

[fol. 144] Schedule IV, Annexed to Stipulation as to Papers Omitted in Printing

Date of Presentation	Face Amount in Dollars	Face Amount in Guilders, Being Also in Each Instance the Amount Demanded by or in Behalf of the Respective Plaintiffs	Dollar Amount Awarded on Plaintiff's Motion*
Plaintiff Anglo-Continentale Treuhand, A. G.			
Apr. 17, 1936	$4,425	11,018.40	$7,472.28
Jul. 2, 1936	5,800	14,442.23	9,795.55
Jul. 20, 1936	250	622.50	453.56 (1)
Plaintiff N. V. Anglo-Continentale Trust Maatschappij			
Feb. 26, 1935	250	622.50	421.23
Jun. 18, 1935	8,275	20,605.30	13,942.78
Jul. 9, 1935	1,250	3,112.50	2,155.49 (2)
Plaintiff Mondiale Handels-Und Verwaltungs, A. G.			
Jun. 18, 1935	2,700	6,723.18	4,538.04
Apr. 1, 1936	1,625	4,046.36	2,731.23
Jul. 9, 1936	2,950	7,345.56	4,995.81 (3)
Plaintiff Hydropress Handels, A. G.			
Jul. 21, 1936	250	622.52	432.21 (4)

*The dollar amounts awarded to the plaintiffs in respect of coupons as shown in this column, are calculated at the lowest rate of exchange in Amsterdam, Holland, on the respective maturity dates of said coupons, using the rates set forth in the affidavit of George L. LeBlanc sworn to on September 9, 1937, in support of the motion.

(1) Includes $31.40 in respect of protest fees in the amount of 46.30 guilders, the dollar value of said guilders being calculated at the lowest rate of exchange in Amsterdam, Holland, on the respective dates of presentation, using the rates set forth in the affidavit of George L. LeBlanc sworn to September 9, 1937, in support of the motion.

(2) Includes $49.36 in respect of protest fees in the amount of 72.95 guilders, the dollar value of said guilders being calculated at the lowest rate of exchange in Amsterdam, Holland, on the respective dates of presentation, using the rates set forth in the affidavit of George L. LeBlanc sworn to September 9, 1937, in support of the motion.

(3) Includes $37.66 in respect of protest fees in the amount of 55.80 guilders, the dollar value of said guilders being calculated at the lowest rate of exchange in Amsterdam, Holland, on the respective dates of presentation, using the rates set forth in the affidavit of George LeBlanc sworn to September 9, 1937, in support of the motion.

(4) Includes $10.04 in respect of protest fees in the amount of 14.80 guilders, the dollar value of said guilders being calculated at the lowest rate of exchange in Amsterdam, Holland, on the date of presentation, using the rate set forth in the affidavit of George L. LeBlanc sworn to September 9, 1937, in support of the motion.

[fols. 145-146] In Supreme Court of New York

Stipulation Waiving Certification

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the judgment and order appealed from and all the papers upon which the court below acted in making the judgment and order appealed from and the whole thereof now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated, April —, 1938.

Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Appellant. Harry Hoffman, Attorney for Plaintiffs-Respondents.

[fol. 147] In Supreme Court of New York, New York County

Index No. 32,424—1936

Anglo-Continentale Treuhand, A. G., a Liechtenstein Corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo Continental Trust Company), a Netherlands Corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein Corporation, and Hydropress Handels, A. G., a Liechtenstein Corporation, Plaintiffs,

against

Bethlehem Steel Company, Defendant

Notice of Appeal to Court of Appeals by Plaintiffs-Appellants-Respondents

Sirs:

Please take notice that the above-named plaintiffs hereby appeal to the Court of Appeals of the State of New York from so much of the judgment entered upon the decision of the Appellate Division of the Supreme Court, First Judicial Department, in the office of the Clerk of the County of New York on the 29th day of July, 1938, as modifies and reduces the judgment of the Supreme Court, New York County, en-

tered in the office of the Clerk of the County of New York on the 30th day of October, 1937, in favor of the plaintiff [fol. 148] Anglo-Continentale Treuhand, A. G. and against the defendant Bethlehem Steel Company, from the sum of $19,245.48 to the sum of $11,834.17, and as modifies and reduces the judgment of the Supreme Court, New York County, in favor of the plaintiff N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) and against the defendant Bethlehem Steel Company, from the sum of $18,898.70 to the sum of $11,600.67, and as modifies and reduces the judgment of the Supreme Court, New York County, in favor of the plaintiff Mondiale Handels-Und Verwaltungs, A. G. and against the defendant Bethlehem Steel Company, from the sum of $13,579.81 to the sum of $8,369.69, and as modifies and reduces the judgment of the Supreme Court, New York County, in favor of the plaintiff Hydropress Handels, A. G. and against the defendant Bethlehem Steel Company, from the sum of $465.85 to the sum of $280.37; and that the above-named plaintiffs also appeal from so much of said judgment as awards costs and disbursements to the defendant and against the plaintiffs in the sum of $881.70; and that the above-named plaintiffs also appeal from the order of the Appellate Division, First Judicial Department, made on July 22, 1938, and entered in the office of the Clerk of the County of New York on July 27, 1938, upon which the aforesaid judgment of the Appellate Division is based; and that the above-named plaintiffs also appeal from each and every such part of said order entered July 27, 1938 and from each and every such part of said judgment entered July 29, 1938, as modifies and reduces the amount of the recovery of the plaintiff Anglo-Continentale Treuhand, A. G. from the sum of $19,245.48 to the sum of [fol. 149] $11,834.17, and as modifies and reduces the amount of the recovery of the plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continentale Trust Company) from the sum of $18,898.70 to the sum of $11,600.67, and as modifies and reduces the amount of the recovery of the plaintiff Mondiale Handels-Und Verwaltungs, A. G. from the sum of $13,579.81 to the sum of $8,369.69, and as modifies and reduces the amount of the recovery of the plaintiff Hydropress Handels, A. G. from the sum of $465.85 to the sum of $280.37; and that the above-named plaintiffs also appeal from each and every such part of said order entered July 27, 1938 and from each and every such part of said judgment entered

July 29, 1938 as awards costs and disbursements to the defendant and against the plaintiffs in the sum of $881.70.

Dated, New York, September 21, 1938.

Yours, etc., Harry Hoffman, Attorney for Plaintiffs-Appellants, Office & P. O. Address, 30 Pine Street, Borough of Manhattan, New York, N. Y.

To Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, 15 Broad Street, New York, N. Y. Archibald R. Watson, Esq., Clerk of the County of New York.

[fol. 150] In Supreme Court of New York, New York County

Index No. 32,424—1936

Anglo-Continentale Treuhand, A. G., a Liechtenstein Corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands Corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein Corporation, and Hydropress Handels, A. G., a Liechtenstein Corporation, Plaintiffs,

against

Bethlehem Steel Company, Defendant

Notice of Appeal to Court of Appeals by Defendant-Respondent-Appellant

Sirs:

Please take notice that the defendant above-named hereby appeals to the Court of Appeals of the State of New York from so much, and only such part, of the judgment of modification in the above-entitled action entered in the office of the Clerk of the County of New York on the 29th day of July, 1938, as adjudged that the judgment in the above-entitled action entered in the office of the Clerk of the County of New York on the 30th day of October, 1937, and the order in the above-entitled action entered in the office of the Clerk [fol. 151] of the County of New York on the 26th day of October, 1937, be modified by reducing the amount of the recovery therein of plaintiff Anglo-Continentale Treuhand,

A. G., of Liechtenstein, Europe, to an amount in excess of $10,475, of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) of Rotterdam, The Netherlands, Europe, to an amount in excess of $9,775, of plaintiff Mondiale Handels-Und Verwaltungs, A. G., of Liechtenstein, Europe, to an amount in excess of $7,275, and of plaintiff Hydropress Handels, A. G., of Liechtenstein, Europe, to an amount in excess of $250, which judgment of modification was entered upon an order of the Appellate Division, First Department (two Justices dissenting and voting for affirmance), entered in the office of the Clerk of the County of New York on the 27th day of July, 1938; and

Please take further notice that the defendant above-named hereby appeals to said Court of Appeals from so much, and only such part, of said order of the Appellate Division, First Department, as ordered and adjudged (two Justices dissenting and voting for affirmance) that said judgment entered on the 30th day of October, 1937, and said order entered on the 26th day of October, 1937 (which are the judgment and order referred to in said order of the Appellate Division, First Department, as the order and judgment appealed from), be modified so as to award interest to plaintiff Anglo-Continentale Treuhand, A. G. on $4,425 from April 17, 1936, on $5,800 from July 2, 1936, and on $250 from July 20, 1936, to plaintiff Anglo-Continentale [fol. 152] Trust Maatschappij (Anglo-Continental Trust Company) on $250 from February 26, 1935, on $8,275 from June 18, 1935, and on $1,250 from July 9, 1935, to plaintiff Mondiale Handels-Und Verwaltungs, A. G. on $2,700 from June 18, 1935, on $1,625 from April 1, 1936, and on $2,950 from July 9, 1936, and to plaintiff Hydropress Handels, A. G. on $250 from July 21, 1936.

Yours, etc., Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Appellant, No. 15 Broad Street, New York, N. Y.

To Harry Hoffmann, Esq., Attorney for Plaintiffs, 30 Pine Street, New York, N. Y. Archibald R. Watson, Esq., Clerk of the County of New York.

[fol. 153] In Supreme Court of New York, New York County

Index No. 32,424—1936

Judgment of Modification

Defendant having appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment entered herein against defendant in the office of the Clerk of the County of New York on October 30, 1937, in favor of plaintiff Anglo-Continentale Treuhand, A. G. for the sum of $19,245.48, in favor of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) for the sum of $18,898.70, in favor of plaintiff Mondiale Handels-Und Verwaltungs, A. G. for the sum of $13,579.81, and in favor of plaintiff Hydropress Handels, A. G. for the sum of $465.85 and for costs in favor of said plaintiffs, and from the order upon which said judgment is based, entered in the office of said Clerk on October 26, 1937, which order struck out the amended answer of defendant and directed that judgment be entered in favor of the plaintiffs, and said Appellate Division, on July 22, 1938, having made an order and judgment modifying said judgment and order appealed from (two of the Justices dissenting and voting for affirmance) by reducing the amount of the recoveries of the respective plaintiffs to the following sums: Anglo-Con-
[fol. 154] tinentale Treuhand, A. G., $10,475, with interest on $4,425 from April 17, 1936, on $5,800 from July 2, 1936, and on $250 from July 20, 1936; Anglo-Continentale Trust Maatschappij (Anglo Continental Trust Company), $9,775, with interest on $250 from February 26, 1935, on $8,275 from June 18, 1935, and on $1,250 from July 9, 1935; Mondiale Handels-Und Verwaltungs, A. G. $7,275, with interest on $2,700 from June 18, 1935, on $1,625 from April 1, 1936, and on $2,950 from July 9, 1936; Hydropress Handels, A. G., $250, with interest thereon from July 21, 1936; and as so modified affirming said judgment and order, with costs and disbursements of the appeal to the defendant, and the remittitur of said Appellate Division having been filed in the office of the Clerk of this Court on the 27th day of July, 1938, it is

Adjudged that the judgment entered herein on October 30, 1937, and the order entered herein on October 26, 1937, upon which said judgment is based, be and are hereby modi-

fied by reducing the amount of the recovery therein of plaintiff Anglo-Continentale Treuhand, A. G. of Liechtenstein, Europe, from the sum of $19,245.48 to the sum of $11,834.17, of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) of Rotterdam, The Netherlands, Europe, from the sum of $18,898.70 to the sum of $11,600.67, of plaintiff Mondiale Handels-Und Verwaltungs, A. G. of Liechtenstein, Europe, from the sum of $13,579.81 to the sum of $8,369.69, and of plaintiff Hydropress Handels, A. G. of Liechtenstein, Europe, from the sum of $465.85 to the sum of $280.37; and it is

[fol. 155] Further adjudged that Bethlehem Steel Company, defendant, a Pennsylvania corporation, of 25 Broadway, New York, N. Y., recover of Anglo-Continentale Treuhand, A. G., a Liechtenstein corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands corporation, Mondiale Handels-Und Verwaltungs, A. G., a Liechtenstein corporation, and Hydropress Handels, A. G., a Liechtenstein corporation, plaintiffs, the sum of $881.70 costs and disbursements on said appeal, as taxed, and that said defendant have execution thereof.

Judgment signed this 29th day of July, 1938.

Archibald R. Watson, Clerk. (Seal.)

[fol. 156] In Supreme Court of New York, Appellate Division

Order of Modification and Affirmance as so Modified—July 22, 1938

Present: Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Irwin Untermyer, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

5590

An appeal having been taken to this Court by the defendant from the judgment entered herein against defendant in the office of the Clerk of the County of New York on October 30, 1937, in favor of plaintiff Anglo-Continentale Treuhand, A. G., for the sum of $19,245.48, in favor of plaintiff Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) for the sum of $18,898.70, in favor of plaintiff Mondiale Handels-Und Verwaltungs,

A. G. for the sum of $13,579.81, and in favor of plaintiff Hydropress Handels, A. G. for the sum of $465.85 and for costs in favor of said plaintiffs, and from the order upon which said judgment is based made herein by Mr. Justice Samuel H. Hofstadter on October 25, 1937, and entered in [fol. 157] the office of said Clerk on October 26, 1937, which order struck out the amended answer of defendant and directed that judgment be entered in favor of the plaintiffs.

And said appeal having been argued by Mr. William D. Whitney of counsel for the appellant, and by Mr. Harry Hoffman, attorney for the plaintiffs-respondents; and due deliberation having been had thereon.

It is hereby ordered and adjudged (two of the Justices dissenting and voting for affirmance):

That the judgment and order appealed from be, and the same are hereby, modified by reducing the recoveries of the respective plaintiffs to the following sums: Anglo-Continentale Treuhand, A. G., $10,475, with interest on $4,125 from April 17, 1936, on $5,800 from July 2, 1936, and on $250 from July 20, 1936; Anglo-Continentale Trust Maatschappij (Anglo-Continentale Trust Company), $9,775, with interest on $250 from February 26, 1935, on $8,275 from June 18, 1935, and on $1,250 from July 9, 1935; Mondiale Handels-Und Verwaltungs, A. G. $7,275, with interest on $2,700 from June 18, 1935, on $1,625 from April 1, 1936, and on $2,950 from July 9, 1936; Hydropress Handels, A. G., $250, with interest thereon from July 21, 1936; and as so modified affirmed, with costs and disbursements of the appeal to the defendant-appellant.

Enter.

F. M.

[fol. 158] In Supreme Court, Appellate Division, First Department, May, 1938

James O'Malley, Alfred H. Townley, Irwin Untermeyer, Albert Cohn, Joseph M. Callahan, JJ.

Anglo-Continentale Treuhand A. G., et al., Respondent

vs.

Bethlehem Steel Company, Appellant

Memorandum Decision

Order and judgment modified by reducing the recoveries of the respective plaintiffs to the following sums: Anglo-

Continentale Treuhand, A. G., $10,475; Anglo-Continentale Trust Maatschappij, $9,775; Mondiale Handels-Und Verwaltungs, A. G., $7,275; Hydropress Handels, A. G. $250; and as so modified affirmed. No opinion. (Untermyer and Callahan, JJ., dissenting and voting for affirmance.)

Settle order on notice.

[fol. 159] In Supreme Court of New York, Appellate Division, First Department

No. 538

[Title omitted]

Stipulation Concerning Any Claim of Disqualification of Mr. Justice Untermyer

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that any claim of disqualification of Hon. Irwin Untermyer to take part, as a member of this Court, in the hearing and determination of the appeal argued before this Court on May 17, 1938, because of his ownership of shares of stock or other securities in any corporate litigant herein or for any other reason, be, and it hereby is, waived by the attorney for the plaintiffs-respondents and by the attorneys for the defendant-appellant pursuant to Chapter 404 of the Laws of New York of 1938; and that the oral stipulation to the same effect made in open court on May 17, 1938, be, and it hereby is, ratified and confirmed.

Dated, New York, N. Y., May 19, 1938.

Harry Hoffman, Attorney for Plaintiffs-Respondents.

Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Appellant.

[fol. 160] In Supreme Court of New York

Affidavit of No Opinion by Appellate Division

State of New York,
County of New York, ss:

Harry Hoffman, being duly sworn, deposes and says:

I am an attorney and counselor at law duly licensed to practice in all the courts of record of this State.

I am the attorney for the plaintiffs-appellants-respondents herein and am familiar with the proceedings had herein upon the appeal to the Appellate Division. No opinion other than the above memorandum decision was rendered by the majority of the Appellate Division in affirming the judgment herein; three Justices (O'Malley, Townley and Cohn, JJ.) voted for modification of the order and judgment of the court below by reducing the recoveries of the respective plaintiffs, and for affirmance of said order and judgment as so modified, and two Justices (Untermyer and Callahan, JJ.) dissented and voted for affirmance.

Harry Hoffman.

Sworn to before me this 7th day of October, 1938. John H. Kay, Notary Public. Nassau Co. No. 669. New York Co. Clk's No. 416. New York Co. Reg. 0K255. Commission Expires Mar. 30, 1940.

[fol. 161] IN COURT OF APPEALS OF NEW YORK

STIPULATION AS TO PAPERS OMITTED IN PRINTING

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following papers need not be printed and may be omitted from the record on appeal to the Court of Appeals herein, and that copies of each of the same may be handed up to the Court of Appeals on the argument of this appeal and may be referred to in the briefs and arguments with the same force and effect as though formally included in the printed record on appeal:

(1) Exhibits A to L, inclusive, annexed to the affidavit of Arpad Plesch, sworn to May 17, 1937, in support of the motion for summary judgment, each of which is a photostatic copy of an exemplified certificate of protest, in the Dutch language (sworn English translations of Exhibits C, E, F, G and H are also annexed as part of said five Exhibits, respectively) for nonpayment of coupons presented at Hope Co., in Amsterdam, Holland, in each instance on behalf of one or another of the respective plaintiffs herein;

(2) So much of Exhibit B annexed to the affidavit of William J. Brown, sworn to May 22, 1937, in opposition to

the motion for summary judgment, as consists of a photostatic copy of a circular, in the Dutch language, issued by [fol. 162] Hope & Co. in Amsterdam, Holland, and dated May 17, 1912, in respect of the issuance of Bethlehem Steel Company First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bonds; and

(3) Stipulation between the parties hereto, dated July 30, 1937, pursuant to which the plaintiffs have deposited their coupons (together with United States Treasury Department Ownership Certificates, Form 1001) with the Treasurer of Bethlehem Steel Corporation in New York, as recited in the order appealed from.

It is further stipulated and agreed by and between the attorneys for the respective parties hereto, that translations of two of the photostatic copies of the exemplified certificates of protest annexed, as Exhibits A to L, inclusive, to the affidavit of Arpad Plesch, sworn to May 17, 1937, in support of the motion for summary judgment, are generally in the forms annexed to the stipulation herein dated March 9, 1938 (a copy of which stipulation appears in the foregoing record on appeal at pages 130-132, fols. 388-396) as Schedule I and Schedule II thereof, which are hereby made a part hereof, with the blanks filled in as indicated by the words in brackets ([ ]) in said Schedule I and Schedule II (a copy of said Schedule I appears at pages 133-134, fols. 397-402, of the foregoing record on appeal, and a copy of said Schedule II appears at pages 135-136, fols. 403-408, of the foregoing record on appeal); that said certificates of protest recite the presentation at Hope & Company in Amsterdam, Holland, of coupons, in each instance on behalf of one or [fol. 163] another of the respective plaintiffs herein, of the various maturity dates and amounts and bearing the serial numbers as indicated in Schedule III, which is hereby made a part hereof, of said stipulation dated March 9, 1938 (a copy of said Schedule III appears at pages 137-143, fols. 409-429, of the foregoing record on appeal); that Schedule IV annexed to said stipulation of March 9, 1938 (a copy of which appears at page 144, fols. 430-432, of the foregoing record on appeal) is hereby made a part hereof and shows (1) the dates of the respective protests in behalf of the respective plaintiffs, (2) the face amount of the coupons as expressed in American dollars, (3) the face amount of the

coupons as expressed in guilders, being also in each instance the amount demanded by or in behalf of the respective plaintiffs, and (4) the dollar amount awarded on plaintiffs' motion, including in the amount so awarded the dollar value of the guilders involved in the protest fees; and that the aforesaid certificates of protest recite, in each instance, the presentation of said coupons, the demand for payment of said coupons in guilders on the dates and in the amounts, respectively, as indicated in said Schedule IV, and the payment of the protest fees in guilders in behalf of the various plaintiffs..

Dated, October 7, 1938.

Harry Hoffman, Attorney for Plaintiffs-Appellants-Respondents. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent-Appellant..

[fol. 164] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notices of appeal, the judgment and order appealed from and all the papers upon which the court below acted in making the judgment and order appealed from and the whole thereof now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated, October 7, 1938.

Harry Hoffman, Attorney for Plaintiffs-Appellants-Respondents. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent-Appellant.

[fol. 165] IN COURT OF APPEALS OF NEW YORK

No. 430B Opinion

ANGLO-CONTINENTALE TREUHAND et al., Appellants-Respondents

vs.

BETHLEHEM STEEL COMPANY, Respondent-Appellant

OPINION

Per CURIAM:

This action is the same in principle as the Zurich Insurance Company case decided herewith. In the present litigation the trial justice granted plaintiff's motion for summary judgment for the amount demanded in the complaint but the Appellate Division modified by reducing the judgment to amounts to conform with the theory that the Joint Resolution of Congress required payment of these coupons in foreign currency in a foreign country based upon the value of United States dollars as depreciated. The judgment of the Appellate Division should be reversed and that of the Special Term affirmed with costs, &c.

[fol. 166] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of January, in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said Court.

Witness: The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

ANGLO-CONTINENTALE TREUHAND, A. G. &c., & Ors., Plaintiff-Appellant-Respondents,

against

BETHLEHEM STEEL COMPANY, Defendant-Respondent-Appellant

REMITTITUR—January 12, 1939

Be it Remembered, That on the 8th day of October in the year of our Lord one thousand nine hundred and thirty-

eight, Anglo-Continentale Treuhand, A. G. &c. & ors., the Plaintiff-Appellant-Respondents, in this cause, came here unto the Court of Appeals, by Harry Hoffman, their attor- [fol. 167] ney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Bethlehem Steel Company, the Defendant-Respondent-Appellant in said cause, afterwards appeared in said Court of Appeals by Cravath, de Gersdorff, Swaine & Wood, its attorneys, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Harry Hoffman, of counsel for the plaintiff-appellant-respondents, and by Mr. Frederick H. Wood, of counsel for the defendant-respondent-appellant, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed with costs in this court and in the Appellate Division to the plaintiffs-appellants.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment of Appellate Division be reversed and that of Special Term affirmed with costs in this court and in the Appellate Division to the plaintiffs-appellants, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals [fol. 168] aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, January 12, 1939.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal of State of New York, Court of Appeals.)

[fol. 169] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

ORDER ON REMITTITUR—January 12, 1939

Plaintiffs having appealed to the Court of Appeals from so much of the judgment entered upon the decision of the Appellate Division of the Supreme Court, First Judicial Department, in the office of the Clerk of the County of New York on the 29th day of July, 1938, as modified and reduced the judgment of the Supreme Court, New York [fol. 170] County, entered in the office of the Clerk of the County of New York on the 30th day of October, 1937, in favor of plaintiff Anglo-Continentale Treuhand, A. G. and against the defendant Bethlehem Steel Company from the sum of $19,245.48 to the sum of $11,834.17, and as modified and reduced the judgment of the Supreme Court, New York County, in favor of the plaintiff N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) and against the defendant Bethlehem Steel Company from the sum of $18,898.70 to the sum of $11,600.67, and as modified and reduced the judgment of the Supreme Court, New York County, in favor of the plaintiff Mondiale Handels-Und Verwaltungs, A. G. and against the defendant Bethlehem Steel Company from the sum of $13,579.81 to the sum of $8,369.69; and as modified and reduced the judgment of the Supreme Court, New York County, in favor of the plaintiff Hydropress Handels, A. G. and against the defendant Bethlehem Steel Company from the sum of $465.85 to the sum of $280.37; and from so much of said judgment as awarded costs and disbursements to the de-

fendant and against the plaintiffs in the sum of $881.70; and plaintiffs also having appealed from the order of the Appellate Division of the Supreme Court, First Judicial Department, made on July 22, 1938, and entered in the office of the Clerk of the County of New York on July 27, 1938, upon which the aforesaid judgment of the Appellate Division was based; and plaintiffs also having appealed from each and every such part of said order entered July 27, 1938, and from each and every such part of said judgment entered July 29, 1938, as modified and reduced the [fol. 171] amount of recovery of the plaintiff Anglo-Continentale Treuhand, A. G. from the sum of $19,245.48 to the sum of $11,834.17, and as modified and reduced the amount of recovery of the plaintiff N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) from the sum of $18,898.70 to the sum of $11,600.67, and as modified and reduced the amount of recovery of the plaintiff Mondiale Handels-Und Verwaltungs, A. G. from the sum of $13,579.81 to the sum of $8,369.69, and as modified and reduced the amount of recovery of the plaintiff Hydropress Handels, A. G. from the sum of $465.85 to the sum of $280.37; and plaintiffs also having appealed from each and every part of said order entered July 27, 1938, and from each and every part of said judgment entered July 29, 1938, as awarded costs and disbursements to the defendant and against the plaintiffs in the sum of $881.70;

And defendant having appealed to the Court of Appeals from so much, and only such part, of the judgment of modification in the above-entitled action entered in the office of the Clerk of the County of New York on the 29th day of July, 1938, as adjudged that the judgment in the above-entitled action entered in the office of the Clerk of the County of New York on the 30th day of October, 1937, and the order in the above-entitled action entered in the office of the Clerk of the County of New York on the 26th day of October, 1937, be modified by reducing the amount of the recovery therein of plaintiff Anglo-Continentale Treuhand, A. G., of Liechtenstein, Europe, to an amount in excess of $10,475, by reducing the amount of the recovery therein of [fol. 172] plaintiff N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), of Rotterdam, The Netherlands, Europe, to an amount in excess of $9,775, by reducing the amount of the recovery therein of plaintiff Mondiale Handels-Und Verwaltungs, A. G., of

Liechtenstein, Europe, to an amount in excess of $7,275, and by reducing the amount of the recovery therein of plaintiff Hydropress Handels, A. G., of Liechtenstein, Europe, to an amount in excess of $250, which judgment of modification was entered upon an order of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of the County of New York on the 27th day of July, 1938; and defendant having appealed to the Court of Appeals from so much, and only such part, of said order of the Appellate Division of the Supreme Court, First Judicial Department, as ordered and adjudged that said judgment entered on the 30th day of October, 1937, and said order entered on the 26th day of October, 1937 (which are the judgment and order referred to in said order of the Appellate Division, First Judicial Department, as the judgment and order appealed from) be modified so as to award interest to plaintiff Anglo-Continentale Treuhand, A. G. on $4,425 from April 17, 1936, on $5,800 from July 2, 1936, on $250 from July 20, 1936, to plaintiff N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company) on $250 from February 26, 1935, on $8,275 from June 18, 1935, and on $1,250 from July 9, 1935, to plaintiff Mondiale Handels-Und Verwaltungs, A. G. on $2,700 from June 18, 1935, on $1,625 from April 1, 1936, [fol. 173] and on $2,950 from July 9, 1936, and to plaintiff Hydropress Handels, A. G. on $250 from July 21, 1936;

And said appeal having been argued by Harry Hoffman, Esq., of counsel for plaintiffs, and Frederick H. Wood, Esq., of counsel for defendant, and due deliberation had thereon, and it having been ordered and adjudged by the Court of Appeals that the judgment of the Appellate Division of the Supreme Court, First Judicial Department, should be reversed and the judgment of the Special Term be affirmed, with costs to the plaintiffs in the Court of Appeals and in the Appellate Division, and it having been further ordered that the record and proceedings thereon be remitted to this Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur of the Court of Appeals dated January 12, 1939, it is, on motion of Harry Hoffman, Esq., attorney for the plaintiffs,

Ordered, that the order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Enter.

A. J. L., J. S. C.

[fol. 174] In Supreme Court of New York, County of New York

Index No. 32424—1936

Anglo-Continentale Treuhand, A. G., a Liechtenstein Corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands Corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein Corporation, and Hydropress Handels, A. G., a Liechtenstein Corporation, Plaintiffs,

against

Bethlehem Steel Company, Defendant

Judgment

A judgment having been entered herein in the office of the Clerk of the County of New York on the 30th day of October, 1937, in favor of the plaintiff Anglo-Continentale Treuhand, A. G., of Liechtenstein, Europe, against the defendant Bethlehem Steel Company, of 25 Broadway, New York, N. Y., in the sum of $19,245.48, and in favor of the plaintiff, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), of Rotterdam, The Netherlands, Europe, against the said defendant in the sum of $18,898.70, and in favor of the plaintiff Mondiale Handels-Und Verwaltungs, A. G., of Liechtenstein, Europe, against the said defendant in the sum of $13,579.81, and in [fol. 175] favor of the plaintiff Hydropress Handels, A. G., of Liechtenstein, Europe, against the said defendant in the sum of $465.85, and in favor of all of said plaintiffs against the said defendant in the sum of $32.65, and the defendant having appealed to the Appellate Division of the Supreme Court, First Judicial Department, from the said judgment and from the order upon which said judgment is based, entered in the office of said Clerk on October 26, 1937, which order struck out the amended answer of the defendant and directed that judgment be entered in favor of the plaintiffs as aforesaid; and said Appellate Division on July 22, 1938, having made an order and judgment modifying said judgment and order appealed from, by reducing the amount of the recoveries of the respective plaintiffs and, as so modified, affirming said order and judgment, with costs and disbursements of the appeal to the defendant; and a judgment

having been entered in the office of said Clerk on July 29, 1938, upon said modification reducing the amount of the recoveries and awarding defendant the sum of $881.70 costs and disbursements against the plaintiffs; and the plaintiffs having appealed to the Court of Appeals from said judgment of modification and from the order of the Appellate Division dated July 22, 1938, upon which said judgment of modification is based; and the defendant having also appealed from the said order and judgment of modification; and said appeals having duly come on to be heard, and having been argued by Mr. Harry Hoffman, of counsel for the plaintiffs-appellants-respondents, and by Mr. Frederick H. Wood, of counsel for the defendant-respondent-appel-
[fol. 176] lant, and the Court of Appeals after due deliberation had thereon, having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court appealed from be reversed and that of the Special Term affirmed, with costs in the Court of Appeals and in the Appellate Division to the plaintiffs-appellants, and that the record and proceedings thereon be remitted to this Court to be proceeded upon according to law, and the said record having been duly remitted to this Court and the remittitur of the Court of Appeals dated January 12, 1939, having been duly filed herein on January 12, 1939, and an order having been made and entered herein by this Court on January 12, 1939 making the said order and judgment of the Court of Appeals the order and judgment of this Court, and the costs having been duly taxed, it is, on motion of Harry Hoffman, attorney for the plaintiffs,

Adjudged, that the order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court; and it is

Further adjudged, that the judgment entered herein on the 29th day of July, 1938, be, and the same hereby is, reversed; and it is

Further adjudged, that the judgment entered herein in favor of the plaintiffs and against the defendant on the 30th day of October, 1937, be, and the same hereby is, affirmed, with costs in the Court of Appeals and in the Appellate Division to the plaintiffs to be taxed by the Clerk of this Court; and it is

[fol. 177] Further adjudged, that the plaintiffs, Anglo-Continentale Treuhand, A. G., of Liechtenstein, Europe, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Con-

tinental Trust Company), of Rotterdam, The Netherlands, Europe, Mondiale Handels-Und Verwaltungs, A. G., of Liechtenstein, Europe, and Hydropress Handels, A. G., of Liechtenstein, Europe, recover of the defendant, Bethlehem Steel Company, of 25 Broadway, New York, N. Y., the sum of $781.75, the costs as taxed by the Clerk of this court, and have execution therefor.

Judgment signed and entered the 12th day of January, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 16, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted, and the case is assigned for argument immediately following No. 590.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,076. New York Supreme Court. Term No. 591. Bethlehem Steel Company, petitioner, vs. Anglo-Continentale Treuhand, A. G., et al. Petition for a writ of certiorari and exhibit thereto. Filed January 13, 1939. Term No. 591, O. T., 1938.

FILE COPY

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FILED
JAN 13 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND CONSENT THERETO BY RESPONDENTS

FREDERICK H. WOOD,
WM. D. WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No.

BETHLEHEM STEEL COMPANY,
Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDRO-PRESS HANDELS, A. G., a Liechtenstein corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bethlehem Steel Company respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of New York, County of New York, entered in the above-entitled case, January 12, 1939, upon the remittitur of the Court of Appeals of the State

of New York reversing a judgment of the Appellate Division of the Supreme Court of the State of New York, which reversed a judgment at Special Term of said Supreme Court of the State of New York.

The opinion of the Court of Appeals was rendered *per curiam* January 11, 1939, and is unreported (R. 165). It followed the opinion of the same Court on the same day, per Judge O'Brien, with dissenting opinion by Judge Finch (in which Judge Hubbs concurred), in the related case of *Zurich Accident, etc., Co.* v. *Bethlehem Steel Company*. The Appellate Division wrote no opinion, but the decision and the dissenting opinion in the Appellate Division in the related case of *Zurich Accident, etc., Co.* v. *Bethlehem Steel Company* are reported in the record in that case, filed simultaneously herewith, at page 101. The opinion of Mr. Justice Hofstadter at Special Term is reported at R. 129.

SUMMARY STATEMENT

This case involves the question presented in No. 384 in this Court, *Guaranty Trust Company of New York* v. *Berryman Henwood, viz.*:

> Does Public Resolution No. 10 of the 73rd Congress (48 Stat. at L. 112) apply to coupons detached from corporate bonds expressed to be alternatively payable in a fixed number of dollars in gold coin of the United States of America at New York and a fixed number of units of a foreign currency at a foreign city, so that a respondent who has demanded payment in the foreign currency is limited in recovery to the number of dollars denominated in the bond, notwithstanding the fact that the value in dollars of the number of units of the foreign cur-

rency denominated in the bond exceeds that number of dollars?

In the present case, Mr. Justice Hofstadter answered the question in the negative at Special Term (R. 129). The Appellate Division of the First Department reversed, with two Justices dissenting (R. 158). The Court of Appeals reversed the decision of the Appellate Division, with two Judges dissenting, and reinstated the decision at Special Term (R. 165).

STATEMENT

The bonds issued by petitioner, from which the coupons involved in this case were detached, carried coupons in the following form (with appropriate insertions in the blank spaces) (R. 44):

On the first day of , 19 ,	$25.00
unless the Bond, hereinafter mentioned,	£5.2.10
shall have been called for previous redemption	62.25 Guilders

BETHLEHEM STEEL COMPANY

will pay to bearer at its office, or agency, in the City of New York, U. S. A., Twenty-Five Dollars, United States Gold Coin, or in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold Bond.

$25.00 Series A No.

(signed)—B. H. JONES, Treasurer No.

After June 5, 1933, the date of the approval of Public Resolution No. 10, the respondents, corporations of the Netherlands and of Liechtenstein, presented their respective coupons (which by their terms were payable after June 5, 1933) for payment in Amsterdam and demanded payment in Dutch guilders. The petitioner refused to meet the demand; whereupon the respondents brought action in the Supreme Court of the State of New York to recover the dollar value of the Dutch guilders which it claimed should have been paid when these coupons were presented for payment, and moved for a summary judgment.

Mr. Justice Hofstadter granted such summary judgment for the value of the guilders measured at the date of maturity of the respective coupons; and his decision (R. 129), though reversed by the Appellate Division (R. 158) (per Justices O'Malley, Townley and Cohn, with Justices Untermyer and Callahan dissenting), was reinstated by the Court of Appeals (R. 165) (Judges Finch and Hubbs dissenting); and summary judgment was accordingly entered against the petitioner.

Reasons Relied on for the Allowance of the Writ

I

A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The question of application of Public Resolution No. 10 to corporate bonds of precisely this character has been in litigation in numerous courts, and has given rise to a remarkable diversity of opinion, but has not yet been the

subject of any action in this Court other than the denial of a petition for writ of certiorari in *Henwood* v. *Anglo-Continentale Treuhand, A. G.*, 298 U. S. 655, and the grant of a petition for a writ of certiorari in *Guaranty Trust Company of New York* v. *Henwood*, Oct. T. 1938, No. 384. Before its decision by the Court of Appeals of the State of New York, the precise question had been before three United States Circuit Courts of Appeals. The 9th Circuit Court of Appeals avoided a determination of the main question by reversing the decision of Judge Lindley, 10 Fed. Supp. 953 (which had been favorable to the respondents here), deciding the case upon a procedural ground, *Southern Pacific Co.* v. *McAdoo*, 82 F. (2d) 121. The 2nd Circuit Court of Appeals decided in favor of the respondent's position in *Anglo-Continentale Treuhand, A. G.*, v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11; and the 8th Circuit Court of Appeals expressly disagreed with it, *Guaranty Trust Company of New York* v. *Henwood*, 98 F. (2d) 160.

The question had been before the Appellate Division of the First Department of the State of New York four times. That Court in each case sustained the petitioner's position,—one Justice (of a court of four) dissenting in the first case, and two Justices (of a court of five) dissenting in the last two cases. *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634; *Anglo-Continentale Treuhand, A. G.*, v. *Southern Pacific Co.*, 251 App. Div. 803; *Zurich General Accident & Liability Insurance Company, Limited* v. *Lackawanna Steel Co.*, 254 App. Div. 839; and *Anglo-Continentale Treuhand, A. G.*, v. *Bethlehem Steel Co.* (this case), 254 App. Div. 844. The Court of Appeals has now reversed the Appellate Division, with two Judges (of a court of seven) dissenting.

We submit that it is rare for a case to reach this Court in which there has been a greater diversity of judicial opinion. The question appears to merit not merely actual decision by this Court (which might in any event be obtained in No. 384), but an opportunity to the parties in the New York State Court litigation to be heard in the presentation of the case to this Court. In other words, whether or not another case which may involve the same question be already here, it would seem that the discretion of this Court should be moved to permit argument before it by the parties which have litigated an important federal question before two state appellate courts that have expressly disagreed—and in each court with two dissenting judges.

In addition, petitioner's counsel (by leave of Court) filed a brief and took part in the oral argument before the 8th Circuit Court of Appeals. See 98 F. (2d) 160, 161.

Finally, it is possible that the decision in No. 384 may go off on a ground different from that on which a decision in this case would be based. See the brief of the respondent in that case in opposition to the petition for writ of certiorari therein. In that event, it would be necessary to grant a review of the cases in the State court, if the federal question is to be decided.

II

A STATE COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The adverse opinion of the Court of Appeals of the State of New York is based on an expressed agreement with the opinion of the 2nd Circuit Court of Appeals in

Anglo-Continentale Treuhand, A. G., v. *St. Louis Southwestern Railway Co.*, 81 F. (2d) 11. The same is true of the dissenting opinion in the intermediate appellate court in New York State (R. 101 in *Bethlehem Steel Company* v. *Zurich, etc. Co.*, submitted simultaneously herewith). Neither opinion gave adequate, or indeed any, consideration to the *language* of the opinions of this Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and related cases, and *Holyoke Water Power Company* v. *American Writing Paper Company*, 300 U. S. 324, which (we submit) determined that cases of the character of this case,—*viz.*, cases involving particular applications of Public Resolution No. 10,—should be determined with a view to effectuating the intent of the Congress as therein set forth.

Indeed, neither in the opinion of the 2nd Circuit Court of Appeals, nor in the opinions of the judges of the courts of the State of New York which have accepted it, do we find any real consideration either of the language of Public Resolution No. 10 or of its spirit.

But in the able and comprehensive opinion of Mr. Justice Rosenman at Special Term in the *Zurich Accident & Indemnity Co.* case, 164 Misc. 498, 299 N. Y. Supp. 862 (decided by the Court of Appeals at the same time as the present case), we find a convincing discussion of the language of Public Resolution No. 10, upholding its plain applicability to the state of facts presented in this case. And in the equally able and comprehensive opinion of Judge Stone for the 8th Circuit Court of Appeals in *Guaranty Trust Company* v. *Henwood*, 98 F. (2d) 160, we find a full discussion of the spirit of the Resolution as expressive of the intent of Congress, as interpreted in the light of the opinions of this Court above referred to:

Norman v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, and *Holyoke Water Power Company* v. *American Writing Paper Co.*, 300 U. S. 324.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, New York County, commanding said court to certify and send to this Court, on a day to be designated, a transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the court below be reversed; and that the petitioner be granted such other and further relief as may be just and proper.

Dated, New York, N. Y., January 13, 1939.

FREDERICK H. WOOD,
WM. D. WHITNEY,
Counsel for Petitioner,
15 Broad Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1938.

No.

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,
Respondents.

STATEMENT OF RESPONDENTS

Now come ANGLO-CONTINENTALE TREUHAND, A. G., N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), MONDIALE HANDELS-UND VERWALTUNGS, A. G. and HYDROPRESS HANDELS, A. G., and state that they do not oppose the granting of a Writ of Certiorari herein. However, Respondents expressly do not accept or agree to, but on the contrary disagree with, the statements and arguments con-

tained in the foregoing petition, except only the statement of the proceedings heretofore had herein.

Respondents respectfully submit that the decision of the Court of Appeals is correct and direct this Court's attention to the case of *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. den. 298 U. S. 655, which Respondents believe sets forth the correct governing law upon the question decided by the Court of Appeals of the State of New York.

Respondents also respectfully call the attention of this Court to the fact that there were other questions presented in this case to the Court of Appeals which that court apparently did not deem it necessary to decide in view of its decision in respect of the non-applicability of the Joint Resolution of Congress to the Coupons here sued upon.

Dated, New York, January 12, 1939.

HARRY HOFFMAN,
Attorney for Anglo-Continentale Treuhand, A. G., N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), Mondiale Handels-Und Verwaltungs, A. G. and Hydropress Handels, A. G.,
30 Pine Street,
New York, N. Y.

APPENDIX

Public Resolution No. 10

73rd Congress

48 Stat. at L. 112

JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to propor regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of

coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of sub-section (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes", approved May 12, 1933, is amended to real as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, 4.40 p. m.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of New York [New York County].

BRIEF FOR RESPONDENTS

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480. 39

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591.

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDRO-PRESS HANDELS, A. G., a Liechtenstein corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK [NEW YORK COUNTY].

BRIEF FOR RESPONDENTS.

I.

Statement Under Rule XXVII.

1. The opinion of the Court of Appeals of the State of New York (R. 109) is unreported. The Appellate Division,

First Department, wrote no opinion, but its memorandum decision (R. 104) is reported in 254 App. Div. 844 (1938). The opinion of the Trial Justice in the Supreme Court, New York County (R. 86), is not officially reported, but is reported in New York Law Journal, October. 15, 1937, page 1164, and in 6 N. Y. Supp. (2d) 334 (1938).

2. The judgment of the Supreme Court, New York County (R. 114), was entered January 12, 1939, pursuant to order (R. 11) made upon the remittitur of the Court of Appeals (R. 109) filed January 12, 1939. The petition for a writ of certiorari was filed January 13, 1939, and was granted January 16, 1939 (R. 116; ... U. S. ...).

3. The statute involved is Public Resolution No. 10, 73rd Congress, approved June 5, 1933, H. J. Res. 192, 48 Stat. 112, Title 31, U. S. C. 463. A copy thereof is annexed hereto, marked Appendix "A."

Statement of the Case.

1. In May, 1912, Petitioner, Bethlehem Steel Company, a Pennsylvania corporation (R. 7) (hereinafter sometimes called "Bethlehem"), issued and delivered a series of bonds known as its First Lien and Refunding Mortgage 5% Thirty-Year Gold Bonds, dated May 1, 1912, and due May 1, 1942 (hereinafter sometimes called "Bonds") (R. 7, 27, 70). Said Bonds provided for payment, at the option of the holder, in the City of New York, U. S. A., of one thousand dollars, or in London, England, two hundred five pounds, fifteen shillings, three pence sterling, or in Amsterdam, Holland, two thousand four hundred ninety guilders, and for payment of interest thereon in said respective currencies at the rate of 5% per annum upon presentation of the coupons annexed thereto (R. 7, 27-28).

2. The portion of the coupon bonds relevant to the issues upon this appeal reads as follows (R. 27):

"UNITED STATES OF AMERICA

COMMONWEALTH OF PENNSYLVANIA.

No. 00000	No. 00000
$1,000 U. S. Gold	$1,000 U. S. Gold
or	**or**
£205.15.3 Stg.	£205.15.3 Stg.
or	**or**
2,490 Guilders	2,490 Guilders

BETHLEHEM STEEL COMPANY

First Lien and Refunding Mortgage Five Per cent. Thirty-Year Gold Bond.

Series A.

Bethlehem Steel Company (hereinafter called the Company), for value received, hereby promises to pay to the bearer, or if registered, to the registered holder of this bond, on the first day of May, 1942, in the City of New York, U. S. A., One Thousand dollars, **or** in London, England, Two Hundred and Five Pounds, Fifteen Shillings, Three Pence Sterling, ***or*** **in Amsterdam, Holland, Two Thousand Four Hundred and Ninety Guilders,** and to pay interest on said principal amount from May 1, 1912, **in said respective currencies,** at the rate of five per cent. per annum, semi-annually on the first day of May and the first day of November in each year, but only upon presentation and surrender, as they severally mature, of the coupons therefor hereto annexed. Payment of the principal and interest of this bond will be made at the office or agency of the Company in the Borough of Manhattan, in said City of New York, in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed on May 1, 1912, **or, at the option of the holder, at designated offices in said foreign cities and countries, respectively, at which it is expressed to be payable."** (Emphasis ours.)[1]

[1] All emphasis in this brief, unless otherwise noted, is ours.

3. The form of one of the coupons reads as follows (R. 30, 42-43):

"On the first day of May 1935 unless the Bond, hereinafter mentioned, shall have been called for previous redemption $25.00

BETHLEHEM STEEL COMPANY

will pay to bearer at its office or agency in the City of New York, U. S. A., Twenty-Five Dollars, United States Gold Coin, or in London, England, Five Pounds, Two Shillings, Ten Pence, or in Amsterdam, Holland, Sixty-Two Guilders Twenty-Five Cents, being six months interest then due on its First Lien and Refunding Mortgage Five Per Cent. Thirty-Year Gold. Bond. £5.2.10 62.25 Guilders

$25.00 Series A No. M15401 No. 46

(signed)—B. H. Jones, Treasurer"

Some of the Bonds were in lesser denominations and the coupons were accordingly likewise for lesser amounts, but, inasmuch as the wording is otherwise identical (R. 12, 30), the detailed provisions of such Bonds and coupons of lesser denominations are not set out here.

4. Respondents are all non-resident foreign corporations, duly organized and existing under the laws of the Principality of Liechtenstein, in Europe, and of The Netherlands (Holland), in Europe (R. 7, 13, 18, 24, 41, 75).

5. Respondents are the owners of Bonds and coupons as set forth in the amended complaint (R. 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 23, 25; see also Schedule III, R. 91 *et seq.*) and in the principal moving affidavit (R. 45, 46, 48, 49, 50).

6. Respondents duly elected to demand and receive, with respect to all of the coupons sued upon, the specific number

of guilders in Amsterdam, Holland (R. 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 23, 25; R. 45, 47, 48, 49), set forth in the coupons (viz., 62.25 guilders in the case of the typical coupon), but Petitioner refused to pay said coupons in Amsterdam, Holland, in accordance with such demands (*id.*); see, also, particularly, typical forms of protest, R. 88-89; 89-90).

7. The amended answer alleges (R. 40) Petitioner's willingness to pay in money of the United States *in the City of New York* the sum of $25 in respect of each typical coupon (being neither the foreign place of payment nor the foreign currency set forth in the coupons and chosen by these foreign Respondents), and specifically admits the non-payment of the amounts sued for (R. 31, 32, 33, 34, 35, 36, 37).[2]

8. When the Bonds were originally offered for sale in the United States, "simultaneous but entirely separate and distinct offerings were made in London and in Amsterdam" (R. 44, 71, 76, 78) "thus" (according to the offering circular) "assuring an international market" (R. 44, 76).

The offering circular, upon the original sale of the Bonds in Holland, was in the Dutch language (R. 81). In the offering circular the statement was made that application would be made to list the issue on the New York Stock Exchange and, if deemed desirable, on one or more foreign exchanges (R. 77); and, in fact, the Bonds were originally listed on the New York, London and Amsterdam Stock Exchanges and at the time the principal moving affidavit was made (May 17, 1937) were mainly traded in in Amsterdam (R. 55-56).

The purpose of providing for payment of the interest on and the principal of such Bonds in foreign currencies abroad

[2] After the amended answer was served, the parties stipulated for the deposit of the coupons with Petitioner's representative, and certain payments were made by Petitioner to Respondents to be credited on account of any judgment to be rendered herein (Stipulation omitted in printing, R. 87).

was as follows (see letter dated January 11, 1934, written in behalf of Petitioner to the New York Stock Exchange [R. 44, 58]):

> "* * * to facilitate their sale and distribution in such countries by enabling residents of such countries who might purchase any of such bonds to collect such interest and principal at the respective maturity dates **in such countries and in the currencies of such countries in specified amounts**" (R. 44, 58).

In said letter of January 11, 1934, the following representation was also made:

> "In accordance with such purpose we made or will make provision whereby owners of such bonds residing in foreign countries upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof in such countries and in the currencies of such countries in the amounts specified in such coupons for such countries."

Under date of August 7, 1934, the last-mentioned representation was retracted and it was announced that payment to foreigners in foreign currencies abroad would be refused unless certain conditions, not specified in the coupons or in the Bonds or in the Indenture securing the same, were complied with (see R. 52, 59), the effect of which would have been to make the coupons non-negotiable, despite the specific language in the Bond itself that the coupons should be transferable by delivery merely, and should be negotiable (even if the coupon bonds were to be registered as to principal) (R. 29). The further effect was to pay guilders to certain foreign holders abroad and not to others.

9. The question of the applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency coupons has heretofore been litigated and adjudicated between Petitioner and two of the Respondents herein (Anglo-Continentale Treuhand, A. G. [hereinafter called "Anglo"] and Mondiale Handels-und Verwaltungs, A. G.

[hereinafter called "Mondiale"]). Such adjudication was had in a suit brought by said two Respondents entitled "Mondiale Handels-und Verwaltungs, A. G. and Anglo-Continentale Treuhand, A. G. against Bethlehem Iron & Steel Corporation" (which defendant has since been merged into this Petitioner, R. in No. 591, 8, 23) upon coupons similar to those here sued upon (and identical with those involved in No. 591), issued by Lackawanna Steel Company and assumed by Petitioner (Petitioner's Brief, p. 3). Said action was in the Supreme Court, New York County, Index No. 13406-1936, and is hereinafter for convenience referred to as the "First Action." The same issues of law and of fact were involved in the "First Action" as are involved at bar.

The judgment in the "First Action," in favor of said two Respondents, was entered on July 1, 1936, in the Supreme Court, New York County, pursuant to written opinion of Mr. Justice Hofstadter, reported in the New York Law Journal of June 13, 1936, page 3029.

Although notice of appeal was served by this Petitioner in the "First Action," the appeal was not prosecuted; the judgment in the "First Action" was paid in full, with interest, and is no longer appealable.

Mr. Justice Hofstadter's opinion in the case at bar appears at R. 86. In that opinion he took judicial notice of the "First Action," using the following language (R. 86):

> "Motion for summary judgment is granted. This court has already granted summary judgment on a similar state of facts. There is nothing contained in the recent decisions to warrant a result different from that reached by this court in the cases decided in June, 1936. Settle order."

As between Petitioner on the one hand and Respondents Anglo and Mondiale on the other hand, therefore, the applicability of the Joint Resolution to the multiple currency coupons is *res adjudicata* in favor of said Respondents.

No issue of fact is raised by the amended answer; only questions of law are presented on this appeal (R. 56).

The Questions Presented.

Petitioner has misconceived the questions presented upon this appeal, and has accordingly stated them incorrectly at page 2 of the petition herein.

The actual questions presented are as follows:

(1) Does the Joint Resolution of Congress of June 5, 1933 (48 Stat. 112, Title 31, U. S. C., Sec. 463),[3] operate to deprive Respondents, foreigners resident abroad, of the right, specifically granted to them, to demand and receive in Amsterdam, Holland, upon presentation of the coupons, the specific number of guilders (viz., 62.25 guilders, in the case of a typical coupon) specifically promised by Petitioner to be payable in said city upon such presentation?

(2) If so, is it (a) a constitutional exercise of the powers of Congress in respect of foreigners resident abroad or (b) an effectual or valid exercise of such powers?

(3) If Questions (1) and (2) be answered in the affirmative, should not the judgment below nevertheless be affirmed as to Respondents Anglo and Mondiale because the judgment of July 1, 1936, in the "First Action," constitutes *res adjudicata* between Petitioner on the one hand and said two Respondents on the other hand?

(4) Are not all Respondents, under the particular circumstances of this case (no proper tender having been made by Petitioner and no tender, if any be deemed made, having been kept good by it), in any event entitled to interest and costs?

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[3] Hereinafter sometimes called "Joint Resolution" or "Resolution."

II.

SUMMARY OF ARGUMENT.

POINT A.

This is not a "gold" or a "gold coin" or a "gold clause" case. The case involves the right of foreign coupon holders to exercise a separate and distinct alternative, specifically set forth in the coupons, to demand and receive specified amounts of foreign currencies, as specifically set forth in the coupons, in foreign places, likewise specifically designated in the coupons. No demand for (a) "gold," or (b) "a particular kind of coin or currency of the United States," or (c) "an amount in money of the United States measured thereby," was made by Respondents either in the United States or elsewhere. The amounts of foreign moneys are not dependent upon the dollar amount.

The case is a simple one in contracts, and the "gold clause" is not even remotely involved.

POINT B.

The Joint Resolution is not applicable to the coupons sued upon. It does not extend to provisions of instruments which give the obligee a right to require payment otherwise than (a) "in gold" or (b) in "a particular kind of coin or currency of the United States" or (c) "in an amount in money of the United States measured thereby"; nor does it extend to such instruments or obligations as are, or as become, payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the separate foreign money alternatives of the coupons sued upon.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies abroad remaining unaffected.

(3) The Joint Resolution can in no way affect a contract to be performed in another country in the lawful money of that country.

(4) Payment in guilders is not equivalent to payment in gold.

(5) Payment in guilders does not affect the equal parity of the dollars of the United States with each other.

(6) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right of foreigners, resident abroad, to demand and receive guilders in Holland. No public policy inhibits such payment.

(7) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the payments to foreigners abroad of the foreign money alternatives contained in the coupons sued upon.

(8) To hold that the foreign money alternatives contained in multiple currency clauses are condemned by the Joint Resolution would deprive these holders of these coupons of their property without due process of law in violation of the Fifth and Tenth Amendments.

(9) This Court's decision in the "Holyoke" Case supports our position.

(10) Decisions of Federal and State Courts construing the Federal statute here involved in relation to the foreign money alternatives in multiple currency clauses support our position.

(11) Respondents are foreigners, and the Joint Resolution does not purport to affect, and cannot affect, payments in foreign moneys to be made to foreigners abroad.

(12) Summary Statement showing non-applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses.

Point C.

(1) The place and medium of payment of the coupons were at the holder's option, and the obligor must discharge its indebtedness as the holder elects.

(2) An obligation in terms of the currency of a country takes the risk of currency fluctuations, and whether debtor or creditor profits, the law takes no account of it.

(3) As a result of Respondents' election, the law of the place of performance (Holland) governs, and under that law Respondents' choice of the medium of payment is legal.

(4) Respondents are entitled to recover in full, as held by the Court of Appeals, whether American or Dutch law be applied.

Point D.

The functional approach to Petitioner's interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

Point E.

Whatever may be the decision of this Court as to the general application of the Joint Resolution to foreign money alternatives contained in multiple currency clauses, the judgment appealed from should be affirmed as to Respondents Anglo and Mondiale.

(1) Respondents may urge all grounds for sustaining the judgment appealed from, whether or not raised by the petition.

(2) The Trial Justice properly took judicial notice of the "First Action."

(3) The judgment in the "First Action" is *res adjudicata* between Petitioner and Respondents Anglo and Mondiale.

(4) Irrespective of any decision by this Court as to the applicability of the Joint Resolution to the foreign money alternatives in the coupons, the judgment below should be affirmed as to Respondents Anglo and Mondiale. A supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation in whole or in part of the doctrine of *res adjudicata*.

Point F.

At all events, all Respondents are entitled to interest and costs.

Point G.

The basic fallacy of Petitioner's Brief is that Petitioner is trying to amend the Joint Resolution by inserting words and definitions not therein contained. It starts with a false premise (i. e., by assuming as a premise its erroneous conclusion that the Joint Resolution applies to the foreign money alternatives contained in multiple currency clauses), bolsters it with inapplicable reasoning, and thus reaches a fallacious conclusion (i. e., that the Joint Resolution applies to such foreign money alternatives).

No public policy or statute inhibits the payment sought at bar.

The judgment appealed from should be affirmed.

III.

ARGUMENT.

Preliminary Statement.

Counsel for Respondents herein has filed a motion with this Court for leave to file a brief as *amicus curiae* in *Guaranty Trust Company of New York, as Trustee, etc.* v. *Henwood, Trustee, etc., et al.*, October Term, 1938, No. 384, which last-mentioned case (followed by *Chemical Bank & Trust Co., etc.* v. *Henwood, Trustee, etc.*, October Term, 1938, No. 495, and by *Bethlehem Steel Co.* v. *Zurich General Accident & Liability Ins. Co.*, October Term, 1938, No. 590) has been assigned for argument prior to the instant case.

In view of the fact that Petitioner's joint brief in No. 590 and the case at bar frequently refers to No. 384 and to the brief of the petitioner in that case, we deem it relevant to point out certain differences between the aforesaid cases and the case at bar.

A. In respect of No. 384:

(1) Petitioner in No. 384 is the corporate trustee under the mortgage securing said bonds. Respondents in No. 384 contended before the District Court and before the Circuit Court of Appeals (8th) and in their joint brief to this Court in opposition to petition for writ of certiorari in No. 384, that the Joint Resolution is not really and truly involved in No. 384 (see said joint brief, pp. 7-8), and that the actual question involved is whether, inasmuch as the option to receive guilders "was specifically reserved to the holders of the bonds and was not conferred upon the mortgage trustee, the mortgage trustee may elect to take guilders in behalf of bondholders who have refrained from making such an election upon their own account and who have not authorized the mortgage trustee to make such an election for them."

One of the respondents in No. 384 urges the same point upon the appeal to this Court.

If, therefore, this Court should heed such arguments, the decision in No. 384 would not be relevant upon the issues in the instant case (No. 591).

(2) Petitioner in No. 384 is a domestic corporation, whereas at bar (No. 591) all Respondents are foreigners, resident abroad, and with no office or place of business within the United States. A holding as to the applicability of the Joint Resolution in No. 384, adverse to the petitioner in No. 384, would, therefore, not be decisive of the issues at bar. Respondents in No. 384 themselves recognize this in their briefs.

(3) An actual Dutch offering was made at bar (see R. 44, 71, 78, 81, 87), which seemingly may not have been the case in No. 384. This is a point upon which respondents in No. 384 rely heavily in their briefs.

(4) No. 384 arises in a reorganization proceeding. The Circuit Court of Appeals in that case apparently based its decision, in part at least, upon this circumstance (see 98 F. [2d] 160, at 165).

(5) In No. 384 no proof of Dutch law appears in the record in respect of alternative obligations, such as appears in the instant case (No. 591) at R. 51.

B. In respect of No. 495:

(1) Petitioner in No. 495 holds a registered bond, not containing multiple currency clauses, but exchangeable, by its terms, into coupon bonds containing such clauses. One of the respondents in No. 495 urges that the right to exchange registered bonds (without multiple currency clauses) into coupon bonds (with multiple currency clauses) lapsed upon the filing and approval of the petition in reorganization.

(2) Furthermore, in No. 495, the registered bond so held by petitioner therein is held as collateral merely, and one of the respondents in No. 495 urges that the right to take foreign currencies, if any (and assuming that the registered bond, without multiple currency clauses, is exchangeable after bankruptcy into coupon bonds, with multiple currency clauses), resides in the pledgor (the Railway Company and/or its Trustee) and not in the pledgee (the petitioner in No. 495).

If this Court should heed either or both of such arguments so advanced in No. 495, the decision in that case would therefore be inapplicable to the instant case (No. 591).

(3) Furthermore, in No. 495 no proof of Dutch law appears in the record in respect of alternative obligations, such as appears in the instant case (No. 591) at R. 51.

C. In respect of No. 590:

No. 590 involves the election to take Swiss francs in Switzerland. Inasmuch as Petitioner submits a joint brief in No. 590 and No. 591, it is pertinent to mention that Swiss law as to alternative obligations was not included in the record in No. 590; and if this Court should deem that the pertinent law of the place of performance in respect of alternative obligations is a necessary part of the record, it is conceivable that if any adverse result be reached by this Court in that case it may therefore not be decisive of the instant case (No. 591).

POINT A.

This is not a "gold" or a "gold coin" or a "gold clause" case. The case involves the right of foreign coupon holders to exercise a separate and distinct alternative, specifically set forth in the coupons, to demand and receive specified amounts of foreign currencies, as specifically set forth in the coupons, in foreign places, likewise specifically designated in the coupons. No demand for (a) "gold", or (b) "a particular kind of coin or currency of the United States", or (c) "an amount in money of the United States measured thereby",[4] was made by Respondents either in the United States or elsewhere. The amounts of foreign moneys are not dependent upon the dollar amount.

The case is a simple one in contracts, and the "gold clause" is not even remotely involved.

From a reading of Petitioner's brief it might be assumed that Respondents are arguing that the Joint Resolution does not apply to "gold clauses." Such is not the fact. Respondents readily acquiesce that the "gold clause" in the coupons was stricken by the Joint Resolution. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935) (hereinafter sometimes referred to as the "Norman" case).

What Respondents do contend is that, the "gold clause" having been stricken, the instrument must be read as though the words "lawful money" had appeared therein wherever the words "gold coin" now appear, and that all the resulting promise to pay lawful money and the separate promises to pay foreign currencies abroad remain unaffected.

This case does not involve any demand by Respondents, foreigners, for either (a) "gold" or (b) a "particular kind of coin or currency of the United States" or (c) "an amount in money of the United States Measured thereby."[4] No demand for any thereof was made by Respondents either in the United States or elsewhere.

Petitioner speciously argues that, because instruments containing provisions for payment in multiple currencies

[4] i. e., measured by "gold" or by a "particular kind of coin or currency of the United States."

may be or are included in the amount of "gold clause" bonds referred to in the *Norman* case, and because it was decided in *Compania de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N. Y. 22 (1935), cert. den. 297 U. S. 705 (1936), that a "gold clause" provision in a bond is discharged by payment of lawful money, these simple circumstances permit Petitioner to discharge the chosen foreign currency promise in the coupons by paying, to foreigners resident abroad, $25 in the United States instead of 62.25 guilders in Holland.

Such arguments miss the point.

In the *Norman* and *Inversiones* cases the transactions were purely domestic ones; the bonds were payable *in gold dollars only*, in New York; *there were no foreign money alternatives in the instruments;* no promises were made therein for payments of such foreign moneys abroad; and it was held in suits brought in the courts of the State of New York to enforce the "gold clause" provision of the bond, lawful money only could be recovered, but not the gold coin or its value.

The sole question in the *Norman* case is stated at page 243 of the report to be the "review of two decisions sustaining the power of Congress to invalidate **'gold clauses'** in private money contracts."

It is seen that the validity of the "gold clause" was the only question before the Court. **No question of multiple currencies was even remotely involved in the case,** and there was no holding that any other portion of the instrument was affected by the striking of the "gold clause" (see p. 29, *infra*).

To the extent that the coupons here sued upon provide for payment in gold coin, they come within the condemnation of the Joint Resolution as construed in the *Norman* and *Inversiones* cases—in other words, to the extent (but no more) that the coupons contain a provision for payment in gold coin, the obligation to pay lawful money is substituted for the obligation to pay gold coin. But this suit is brought under another limb of the instrument (the promise to pay guilders in Holland), and inasmuch as, and to the extent

that, the "gold clause" is not involved, neither the Joint Resolution nor the *Norman* case nor the *Inversiones* case apply.

All holders of the "gold clause" (including Respondents) are treated alike by the Joint Resolution,—i. e., the "gold clause" is stricken. In that respect Respondents, insofar as their bonds and coupons contain a "gold clause," are on a parity with the holders of every other "gold clause." But inasmuch as Respondents did not try to collect under the "gold clause," the separate promises to them to pay foreign moneys abroad are no more affected than if the contract were a simple promise to pay guilders in Holland.[5] (See brief of respondent Southern Pacific Co. in No. 384, where, at p. 21, it is admitted that a contract to pay foreign money only is enforceable; see also concession of Petitioner, in its reply brief to the Court of Appeals, quoted at p. 34, *infra*.)

As will be shown more fully later in Point B (4) (*infra*), Petitioner's contentions are without merit when it is realized that guilders are not "gold," nor a "particular kind of coin or currency of the United States,"[6] nor "an amount in money of the United States measured thereby."[6] Neither are guilders legal tender in the United States.

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[5] See *Petkus* v. *Lietuvos Ukio Bankas*, 123 Misc. (N. Y.) 193 (1924), where, in an action for rescission, the Court said at page 195:

> "The option which was afforded to him by the defendant as to the manner in which he might pay for the stock did not persist in the relations of the parties after the option had been acted upon by the plaintiff.
>
> "The accuracy of this conclusion is made apparent by considering a concrete situation which is not concerned with money. For instance, suppose the situation was one of primitive barter. Suppose A agreed to deliver an identified horse to B in exchange for either two identified cows or ten identified sheep. B has neither the sheep nor the cows but has other chattels with which he can obtain and does deliver the sheep. A later fails to deliver the horse as agreed. B elects to rescind the contract and makes a demand to that end. Before doing so the intrinsic value of the ten sheep which had an equivalent value to the two cows at the time of the agreement has depreciated. He, therefore, because A at one time was willing to accept the equivalent of the ten sheep in the form of two cows, demands that A give him back two cows. A never received the two cows, although he received their one time equivalent in value in sheep. It would be a patent absurdity to hold that a demand for the return of the cows, which had never been delivered by B to A, entitled B to damages based upon the value of the cows as at the date of the delivery of the sheep in an action *based on rescission*. Such a demand made by B upon A would inevitably be held not to be such a rescission as would sustain a cause of action set out on the theory of a disaffirmance of the contract. This illustration is precisely parallel to the facts involved in the complaint herein."

[6] i. e., measured by "gold" or by a "particular kind of coin or currency of the United States."

Petitioner's contentions might possibly have had a modicum of plausibility prior to 1857, in which year foreign coins were declared to be no longer legal tender.

But by Chapter LVI of the Laws of 1857, 11 Stat. 163—*"An Act relating to Foreign Coins and to the Coinage of Cents at the Mint of the United States"*—it was provided (so far as relevant here) as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
>
> * * * * * * * * *
>
> "Sec. 3. *And be it further enacted,* That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are hereby repealed; * * *."

The law in its present form is found in 31 U. S. C., Sec. 456; R. S., Sec. 3584.

It is therefore seen that, although guilders are not now and never were "coin or currency of the United States," even the quality of legal tender which foreign moneys might have had prior to that time was thereby destroyed. The value of foreign moneys for commercial purposes is established by the usage of merchants or the actual market value thereof (*Gunther* v. *Colin,* 3 Daly [N. Y.] 125 [1869]).

Foreign money (guilders), while money in Holland, is a mere commodity in the United States.

As was said in *Petkus* v. *Lietuvos Ukio Bankas,* 123 Misc. (N. Y.) 193, 197 (1924), when foreign money

> "* * * is the basis of the damage computation, the damages are fixed in the domestic legal tender equivalent of the value of foreign money or commodity (at the rate of exchange prevailing) at the time when, and the place where, the contract ought to have been performed. *Di Ferdinand* v. *Smits & Co.,* 11 Am. Law Reg. 358; *Ladd* v. *Arkell,* 8 J. & S. 150; *Guiteman* v. *Davis,* 3 Daly, 120, *Stewart* v. *Chambers,* 2 Sandf. Ch. 422; *Robinson* v. *Hall,* 28 How. Pr. 342; *King* v. *Hamilton,* 12 Fed. Rep. 478; 18 R. C. L. §17."

See, also: *Deutsche Bank* v. *Humphrey,* 272 U. S. 517, 521 (1926); *Restatement, Conflict of Laws,* Sec. 423; *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.,* 81 F. (2d) 11 (C. C. A., 2nd, 1936), cert. den. 298 U. S. 655 (1936) (hereinafter sometimes referred to as "St.

Louis Southwestern case"); *Hoppe* v. *Russo-Asiatic Bank*, 235 N. Y. 37 (1923); *Richard* v. *American Union Bank*, 241 N. Y. 163 (1925); *Kantor* v. *Aristo Hosiery Co., Inc.*, 222 App. Div. (1st Dept., 1928) 502, aff'd 248 N. Y. 630 (1928).

Coin and currency of the United States therefore enter this case only as the measure of the damages which Respondents are entitled to recover, and not otherwise.

Prior to the passage of the Joint Resolution the damages could have been awarded in gold coin, if the parties had specially contracted with reference to such currency, it being legal tender at that time; otherwise damages, even prior to the passage of the Joint Resolution, would have been awarded in legal tender without reference to or specification as to gold coin. *Bronson* v. *Rodes*, 74 U. S. 229, 254 (1868); *Butler* v. *Horwitz*, 7 Wall. 258 (1868); *Chrysler* v. *Renois*, 43 N. Y. 209 (1870); *Wild* v. *N. Y. & Austin Silver Mining Co.*, 59 N. Y. 644 (1874); *Greentree* v. *Rosenstock*, 61 N Y. 583, 590 (1875).

Since the passage of the Joint Resolution damages may no longer be awarded in gold coin, even though gold coin may have been contracted for, since gold coin is no longer legal tender. But, at bar, gold coin was never demanded nor are damages asked either in gold coin or for the value of gold coin. The suit is one merely for damages "in the domestic legal tender equivalent of the value of foreign money or commodity (at the rate of exchange prevailing) at the time when, and the place where, the contract ought to have been performed" (*Petkus* v. *Lietuvos Ukio Bankas*, *supra*, at p. 197).

The fallacy of Petitioner's premises is further demonstrated by the fact that damages are sought in lawful money only, and not (a) in "gold" or (b) in "a particular kind of coin or currency of the United States" or (c) in "an amount in money of the United States measured thereby": its premises falling, its conclusions likewise fall.

Approaching the analysis of the Joint Resolution with the foregoing general principles in mind, it will be clearly seen that the Joint Resolution does not and cannot affect the foreign money alternatives contained in the coupons sued upon.

POINT B.

The Joint Resolution is not applicable to the coupons sued upon. It does not extend to provisions of instruments which give the obligee a right to require payment otherwise than (a) "in gold" or (b) in "a particular kind of coin or currency of the United States" or (c) "in an amount in money of the United States measured thereby"; nor does it extend to such instruments or obligations as are, or as become, payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the separate foreign money alternatives of the coupons sued upon.

Where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding. *Fox* v. *Standard Oil Co.*, 294 U. S. 87 (1935). Such definitions are part of the law and are binding upon the courts. *Sutherland, Statutory Construction*, 2nd Ed., Vol. 2, pp. 684-685, 687.

The meaning of a statute must be sought in the language which it employs. *United States* v. *Standard Brewery*, 251 U. S. 210 (1920); *Lansdown* v. *Faris*, 66 F. (2d) 939 (C. C. A., 8th, 1933).

The Resolution, the text of which is set forth in Appendix "A" of this brief, is clear and unambiguous. The words "obligation" and "coin and currency" are defined in Section 1(b). By inserting the definitions wherever those words appear, the Resolution properly reads as follows (the definitions being inserted by us in brackets):

> "Every PROVISION contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment **in gold or a particular kind of coin or currency [of the United States]**, or in an amount

> in money of the United States measured thereby,[1] is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation [payable in money of the United States] hereafter incurred. Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts."

The scope of the Resolution is expressly limited to obligations and provisions thereof which are *payable in money of the United States.* The intention so to limit the Resolution appears in the preamble (the definitions also being inserted by us in brackets):

> "Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and
>
> "Whereas the existing emergency has disclosed that provisions of obligations [payable in money of the United States] which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby,[1] obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it * * *."

It is true that the word "obligation" is sometimes used generally to refer to an instrument. As used in the Resolution, however, the careful phrasing—"* * * any obligation hereafter incurred [clause 1(a), first sentence] and "Every obligation heretofore or hereafter incurred" [clause (a), second sentence]—can refer only to the duty or liability and not to the instrument itself. The instrument could not be "incurred." The duty or liability could be "incurred."

[1] i. e., measured by gold or by a particular kind of coin or currency of the United States.

In *American and English Encyclopedia of Law,* 2nd Ed., the word **"incur"** is defined as follows:

> "To incur means to become liable or subject to; to cause, occasion, bring on." (citing many cases and illustrations).

The word was so construed when used in a bond of indemnity given to a sheriff, in *Scott* v. *Tyler,* 14 Barb. (N. Y.) 202 (1852), aff'd upon appeal at Monroe Gen. Tm., March, 1853; when used in a guaranty agreement, in *Beekman* v. *Van Dolsen,* 70 Hun (N. Y.) 288 (App. Div., 1st Dept., 1893), where, incidentally, the word "obligation" is also used in the sense of a duty; in *Deyo* v. *Stewart,* 4 Denio (N. Y.) 101 (1847), where, at page 103, it construes the word as we construe it, when applied to a state statute; in *U. S.* v. *Distillery,* 11 Blatchf. (U. S.) 255, Fed. Case No. 14963, 25 Fed. Cas. 854 (C. C., S. D. N. Y., 1873), in construing a Federal statute.

Having thus considered the definition of the word "incurred" as used in the Joint Resolution, a consideration of the word "obligation" as used therein becomes pertinent.

"A contract," said Marshall, C. J., in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197 (1819),

> "is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the *obligation* of his contract."

Chief Justice Marshall's language was drawn from Article I, Section 10, of the Constitution of the United States, using the word "obligation" precisely as we use it here, providing that

> "No state shall pass any law impairing the *obligation* of contracts." [8]

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[8] The cases are legion in which the word is so used: *Fletcher* v. *Peck,* 6 Cranch. 87, 135, 137 (1810); *Ogden* v. *Saunders,* 12 Wheat. 212 (1827); *Von Hoffman* v. *City of Quincy,* 71 U. S. 535, 538 (1866); *Ochiltree* v. *Railroad Co.,* 88 U. S. 249, 252 (1874); *Walker* v. *Whitehead,* 83 U. S. 314, 317 (1872); *Hays* v. *Port of Seattle,* 251 U. S. 233, 237 (1929); *Shriver* v. *Woodbine Bank,* 285 U. S. 467, 478 (1932). See *Sutherland,*

This Court in the *Norman* case, at page 299, also used the word "obligation" precisely as we contend it should be used here when it referred (at p. 299) to the "obligation" to pay in gold coin (see footnote 11, p. 29, *infra*).

It now becomes pertinent to re-examine the definitions contained within the Joint Resolution itself and petitioner's contentions with respect thereto. The term "obligation" and the term "coin or currency" are defined in Section 1(b) as follows:

> "(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

The phrase "every obligation of and to the United States" makes clearer, if further clarification were required, that Congress intended to use the word "obligation" in the sense of duty and not in the sense for which Petitioner contends. The "obligation to" the United States must mean the duty or liability to it. It could not mean the instrument.

Petitioner argues at length that the term "obligation" should be given the restricted meaning of "instrument." It quotes a definition of the word "obligation" from Webster's Dictionary, stating that the only synonym used is "contract"; it fails to point out, however, that the word "contract" is used therein as a verb, not as a noun. In fact, the very definition (incompletely quoted by Petitioner) gives as illustrations: "to incur debt," etc.; "incur emphasizes the

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Statutory Construction, supra, Sec. 660, pp. 1189-1190, where the following language appears:

> "The federal constitution provides that no state shall pass any law impairing the *obligation* of contracts. The obligation of a contract is the law which binds the parties to perform their agreement. It is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."

See also the use of the word "obligation" in *Jackson* v. *United States*, 60 Ct. of Cl. 590 (1925), at page 37, *infra*.

idea of liability," etc.; "as, to incur an obligation," etc.—precisely as used in the Joint Resolution and as contended for by Respondents. The full definition (emphasis NOT ours) is appended in the footnote.* What Petitioner is trying to accomplish is to inject into the Resolution words and meanings which it does not contain, in an attempt to justify its artificial construction thereof, and thereby to rewrite the statute and the law to suit its own purposes. This it cannot successfully do.

Petitioner's construction of the words used in the Joint Resolution, in the teeth of the definitions so expressly supplied by Congress, violates every canon of statutory interpretation and cannot prevail. *U. S.* v. *Musgrave*, 160 Fed. 700 (1908); see *Sutherland, Statutory Construction*, p. 21, ¶ 3.

Applying the definitions contained in the Joint Resolution itself—and these are the ruling definitions in this case—it becomes crystal clear that the words "obligation incurred" mean the duty to which the contracting party has obligated itself or the liability to which it has subjected itself.

We submit that the Joint Resolution is clear and complete and does not condemn, and was not intended to condemn, payment of foreign monetary units to foreigners abroad. But even were the Resolution incomplete or defective (which we deny), whether as a result of inadvertence, *Ripley* v.

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*Webster's New International Dictionary of the English Language, 2d Ed., 1935—p. 1261.

IN-CUR, v.; curred'; -cur'-ring. (L. *incurrere* to run into or toward, fr. *in* + *currere* to run. See CURRENT.)

Transitive: 1. To meet or fall in with, as something inconvenient or harmful; to become liable or subject to; to bring down upon oneself; as, to *incur* debt, danger, displeasure, penalty, etc.

2. To render liable or subject to; to bring; entail. *Obs.*

Intransitive: 1. To run (into); to fall; enter. *Obs.* 2. To accrue; to be involved.

Syn.—INCUR, CONTRACT agree in the idea of bringing upon oneself something unpleasant, onerous, or injurious. INCUR emphasizes the idea of liability and commonly implies voluntary action; CONTRACT more frequently suggests actual, often involuntary, acquisition; as to *incur* an obligation, a penalty, risk, criticism; to *contract* a disease, or bad habit; "A man may speak of his success without *incurring* justly the odium of conceit" (Crabbe); "Man * * * swarming into clans * * * *contracts* defilement" (Cowper).

Ant.—Avoid, escape, avert.

Gifford, 11 Iowa 367 (1860), or because the case in question was not foreseen or contemplated, *Hull* v. *Hull*, 2 Strob. Eq. (21 S. C. Eq.) 174 (1848), it is beyond the province of the Court to supply the omissions, since this would not construe, but would amend, the law, which is within the exclusive province of the legislating body. *Com.* v. *Gouger*, 21 Pa. Sup. Ct. 217, 229 (1902).

Courts confine themselves to the construction of the law as it is, *St. Louis & S. F. R. Co.* v. *Delk*, 158 Fed. 931 (C. C. A. 6th, 1908), rehearing denied 162 Fed. 145 (1908), and not to an attempt to supply defective legislation or otherwise amend or change the law under the guise of construction. *St. Louis & S. F. R. Co.* v. *Delk*, *supra*.

The construction of the Joint Resolution for which Respondents contend is the construction found within the words and meaning of the statute itself; that construction gives reasonable effect to all its parts; and all parts of the Joint Resolution must yield to the definitions contained within the Resolution itself. The construction for which Petitioner contends would result in an amendment of the statute—judicial legislation—to which this Court should not lend itself.

Petitioner complains that Judge Hand, in the *St. Louis Southwestern* case, omitted to discuss what Petitioner describes as "the principal enacting sentence of the Resolution, viz., the second sentence of clause (a)". By what process of reasoning Petitioner reached the conclusion that the second sentence of clause (a) is "the principal enacting sentence of the Resolution", it is difficult to fathom.[10] But whether or not one or another sentence of the Joint Resolution be

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[10] In fact, we should assume that ordinarily each sentence of a statute would be of equal weight with every other sentence. But, so far as concerns the Joint Resolution, if one sentence be deemed to have more weight than another, it is the *first sentence* that must be deemed to be the "principal" one relating to "provisions of obligations," because the preamble (from which the intention of the lawmakers may be gathered) does not refer to obligations *per se*, but does refer to "provisions of obligations" purporting to give the obligee the right to require payment (a) "in gold," or (b) "a particular kind of coin or currency of the United States," or (c) "in an amount in money of the United States measured thereby." Cf. *Knowlton* v. *Moore*, 178 U. S. 41 (1900); *Hammersmith etc. R. Co.* v. *Brand*, 21 L. T. R. N. S. 238 (H. of L. 1869); see *Sutherland, Statutory Construction*, 2nd Ed., Vol. 2, pp. 655-

the "principal enacting sentence", Petitioner's statement is a palpable error. Judge Hand's excellent opinion discussed all parts of the Joint Resolution. and (at page 12) correctly construed the second sentence of clause (a) in the following powerful and logical summary:.

> "It is true that 'a particular kind of coin or currency' means only United States coin or currency, and that 'obligation' means an obligation payable in money of the United States'; still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. **That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not.**"

Petitioner is to-day "voluntarily" paying guilders in Holland to a selected number of coupon holders who comply with certain of its unauthorized requirements (see pp. 27-28 of its Brief; see, also, p. 70 *infra*).

This action on Petitioner's part places it on the horns of a dilemna. It argues on the one hand that payment in guilders on these multiple currency coupons is prohibited by the Joint Resolution because, says the Petitioner (e. g., pp. 27, 38) "it is the *mandate of Congress* that they"—the coupons—" 'shall be discharged upon payment, dollar for dollar, in * * * legal tender', whether or not they contain gold clauses."

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658 [particularly p. 654—"The preamble"], and cases there cited, which at p. 653 quotes from *White* v. *Levy*, 91 Ala. 175 [1890], as follows:

> "If the legislative intent is clearly expressed in the preamble, and the body of the act is so construed as to render its meaning and intent uncertain; and if the act admits of two constructions,—one in accord with the intent clearly expressed in the preamble, and the other in conflict with it,—the courts should adopt that construction which harmonizes with the preamble.")

The construction contended for by Petitioner is not in harmony with the preamble of the Resolution, or with the principles enumerated by this outstanding writer. The construction contended for by Respondents is in accord with the intent of the Joint Resolution, clearly expressed therein.

If indeed, such is the *"mandate" of Congress* (which we deny), then the word "shall" must be construed as imperative and Petitioner, by such "voluntary" payments, must itself be violating the Joint Resolution—otherwise its references to the so-called "mandate" of Congress must be considered as arguments of convenience only. Indeed, if such be the "mandate" of Congress, Petitioner would be compelled to pay $25—even if 62.25 guilders were worth only a fraction of that amount (the German mark alternative in No. 590 is an apt illustration). Nothing could better illustrate that in fact no such "mandate" exists.

At page 28 of its brief, Petitioner seeks to soften the blow of its own reasoning by saying that it may not be *forced* to make such payments, but may do so voluntarily.

But the Joint Resolution may not be construed by Petitioner in one fashion for some of its foreign creditors, and in a different fashion for other foreign creditors holding its identical instruments. Either the Joint Resolution applies to the foreign money alternatives, when the instruments are owned by foreigners, or it does not. We contend that it does not. **Petitioner must itself believe that it does not so apply, for it is inconceivable that otherwise it would "voluntarily" make such payments.** Such action on its part, if it were under no obligation to make such payments (which it contends to be the fact) would, it seems to us, constitute a wilful and unlawful waste of Petitioner's assets by its officers and directors.

The short answer is that Petitioner's refusal to pay guilders in Holland to foreigners resident abroad upon these coupons is an obvious afterthought (compare letter of January 11, 1934, promising that payments in foreign currencies would be made to foreign "residents" [R. 57-58], with letter of August 7, 1934, retracting such statement in respect of certain foreign holders [R. 59-60]) and has no basis in law.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies abroad remaining unaffected.

The Joint Resolution struck the words "gold coin", attached to the dollar amount, from the coupons, the resulting

promise to pay lawful money and the separate promises to pay in foreign currencies abroad remaining intact. *Nussbaum, Multiple Currency and Index Clauses,* 84 U. of Pa. L. R. 569, 571, March, 1936 (commenting favorably upon the decision of the Circuit Court of Appeals in the *St. Louis Southwestern* case. In the article Professor Nussbaum treats the subject of multiple currency clauses exhaustively and concludes that the Joint Resolution does not affect such clauses).

The wording of the Resolution itself makes clear that only the dollar "gold coin" clause of the coupons was intended to be affected—"Every obligation * * * shall be discharged upon payment, **dollar for dollar** * * *,"—not "dollar for pound," or "dollar for guilder," or "dollar for franc,"—but one dollar of lawful American money for each dollar of a particular kind of American money.

Only that single term of that particular one of the promises in the coupons is impossible to perform and illegal (i. e., the "gold coin" term), the resulting promise to pay lawful money and all the separate promises to pay in foreign currencies abroad contained in the bonds and coupons remaining unaffected. *Norman* v. *Baltimore & Ohio R. R., supra,* at 299.

In the *Norman* case, this Court stripped the instrument of its "gold clause" **term,** and left the remainder of the promise unaffected.[11] Following the same reasoning, and stripping the coupons of the "gold clause" term, they become promises to pay $25 lawful money of the United States in America, **or,** at the choice of the holder, in London, England, 5 pounds, 2 shillings, 10 pence, **or,** at the choice of the holder, in Amsterdam, Holland, 62.25 guilders. When the holder elected to take 62.25 guilders in Amsterdam, Holland, all other alternatives were thereby discarded, and Petitioner

[11] "* * * the Government contends that 'the present debtor would be excused, in an action on the bonds, from the obligation to pay in gold coin,' but, 'as only one term of the promise in the gold clause is impossible to perform and illegal,' the remainder of the obligation should stand and thus the obligation 'becomes one to pay the stated number of dollars'." *Norman* v. *Baltimore & Ohio R. R.*, 294 U. S. 240, 299.

was required then to perform according to the single performance then required. *Restatement, Conflict of Laws*, Sec. 356(1).

The coupons must thereupon be read as though they had originally been as follows:

> "On the ..... day of ....., 193..., Bethlehem Steel Company will pay to bearer * * *, in Amsterdam, Holland, Sixty-two Guilders Twenty-five Cents * * *"

This simple reasoning, precisely following the course taken by this Court in the *Norman* case, clearly indicates that the Joint Resolution was not intended to extinguish, and did not in fact extinguish, the "foreign money" alternatives of the coupons.[12]

The contract was legal when made. The fact that one portion of one (unexercised) alternative subsequently became impossible of performance does not destroy the obligor's duty under the (exercised) lawful alternative. *Restatement, Contracts*, Sec. 344, Comment (b); Sec. 469.

The Court of Appeals recognized this reasoning when, in *Zurich General Accident & Liability Ins. Co.* v. *Bethlehem Steel Co.*, No. 590 in this Court,—argued and decided below concurrently with the case at bar,—it made the following statement (No. 590, R. 71):

> "On the facts of this case, the **obligation was not payable in 'money of the United States'** but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become *payable in Switzerland* in Swiss currency."[13]

The fact that foreign holders of the coupons, in addition to their right to take guilders, had the right to take dollars cannot be detrimental to them. They cannot be penalized for

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[12] In fact, not even the whole "gold clause" was extinguished—only "one term of the promise in the gold clause." *Norman* v. *Baltimore & Ohio R.R. Co.*, *supra*, at p. 299. See footnote No. 11, p. 29, *supra*.

[13] At bar, in Holland in Dutch currency.

having secured an additional lawful (but unexercised) right, and this is what Petitioner seeks to do.

> "As soon as the guilder option is exercised, no dollar claim is left. * * * The right to a definite amount of dollars as existing prior to the exercise of the choice is irrelevant in this situation." *Nussbaum*, 84 U. of P. L. R., *supra*, at p. 571.

The fact that all the alternative promises were contained on one piece of paper does not change the guilder promise into one to pay in gold, or in gold dollars, or even in lawful dollars. The contract created as many different obligations as there are different currencies therein. The media of payment being separated by disjunctives, the obligations were alternative. See *Black's Law Dictionary* (2nd Ed.), p. 843.

An apt illustration of the multiple currency features of a contract is found in *Petkus* v. *Lietuvos Ukio Bankas, supra*. Plaintiff in that case agreed to purchase stock in a bank in Lithuania. The contract provided that payment could be made with either German marks or United States dollars. Plaintiff purchased with German marks, procuring the same with American dollars, transmitting the check for the marks to the defendant.

In an opinion which is a model of careful reasoning, the Court held (at p. 195) that *the option* which was afforded to the plaintiff "by the defendant as to the manner in which he might pay for the stock *did not persist in the relations of the parties after the option had been acted upon by the plaintiff*," saying, further (at p. 196):

> "Plaintiff was entitled to the stock or the German marks paid as of the then value of either, on August 4, 1921, the day when the contract was to be performed."

And so at bar the "option" was afforded to Respondents as to the manner in which they might demand and receive payment for their coupons. The option "did not persist in the relations of the parties after the option had been acted upon by the" Respondents. Once having elected, both Respondents and Petitioner became bound according to the

single performance which was thereafter required. If guilders had thereafter declined in value, Respondents could not have demanded any greater number of guilders by urging that the number of dollars mentioned in the coupons might then have purchased more guilders than Respondents had elected to receive. Because guilders have increased in value, Petitioner may not now pay a lesser number thereof. Once the election had been made, neither the whims of either of the parties or the vagaries of currency fluctuations could change the number of guilders which Petitioner had become obligated to pay and which Respondents were entitled to receive as a result of their election so made.

The number of guilders is specified and set forth in the coupons themselves, viz., 62.25. Such number of guilders is independent of, and in no way connected with, the number of dollars or other currencies set forth in the coupons. The case is different from that in which the coupons might be payable abroad *at the buying rate of exchange* as between guilders and dollars. Were the coupons so worded, and were Respondents to seek the recovery of the number of guilders which a gold dollar might buy, the case might perhaps be different.[14] Whether or not in such a suppositious case Respondents might be entitled to recover, is not, however, the question before this Court.

Petitioner's arguments are all based upon the fallacious premise that the dollar is the primary or controlling medium of payment and that the number of guilders payable is measured by the number of dollars payable. Such is not the fact.

If, for instance (as in No. 384), the coupons had contained an alternative for payment in German marks, and a German citizen elected to receive 105.05 pre-war marks (now worthless) in Berlin, Germany, in accordance with the fixed terms of the coupons, he would not be entitled thereafter to demand or to receive the $25 set forth in the unexercised alternative

[14] We do not concede such to be the law, since the law of the place of performance would govern, and even under the Joint Resolution the number of foreign monetary units could not be considered as "an amount in money of the United States" measured by "gold" or by "a particular kind of coin or currency of the United States."

in the coupons, even though that number of dollars would purchase a vastly greater number of German marks.

In the instant case, there is just as much logic in permitting Petitioner to specify that the holder must take dollars (although he has chosen guilders) as there would be in permitting it to specify that the holder must take worthless pre-war German marks. If the Debtor has the choice of one currency (dollars), despite its express agreement that the choice resides in the holder, it might just as logically be argued that it has the choice of any other currency whatsoever—a ridiculous situation and one for which even Petitioner cannot contend. Cf. *Hulbert* v. *Carver*, 37 Barb. (N.Y.) 62 (1862).

Thus, the coupons before this Court contain separate, distinct and alternative methods of payment, at the option of the holder, and the number of monetary units demandable and receivable by the holder in foreign countries is in no way dependent upon or related to the dollar.

Such being clearly the case, it is inescapable that the Joint Resolution (which nowhere mentions multiple currency, even by indirection) does not apply to the exercised foreign currency alternative in the coupons before this Court.

Petitioner complains (Petitioner's Brief, p. 11) that if Respondent's construction of the Joint Resolution be correct, there is nothing to prevent the issuance of multiple currency clauses at the present time. That question is not before this Court in this case. Suffice it to say, however, that neither the Joint Resolution nor any other legislation of which we are aware prohibits such instruments. Conceding as we do that the words "lawful money" are substituted for the words "gold coin," it would be perfectly lawful for any debtor to-day to issue instruments payable in "$25 lawful money of the United States in the City of New York, or, at the option of the holder, in 62.25 guilders in Amsterdam, Holland."

There is nothing particularly startling about this. No corporation of the same or kindred status as Petitioner is compelled in the future to finance itself through the use of instruments with multiple currency clauses,—unless perhaps

it seeks (as Petitioner vigorously and avowedly did here) an international market. Nor does the obvious validity of such clauses now and in the future change the fact that Petitioner did issue instruments with multiple currency clauses, and that the Joint Resolution does not apply to such instruments so issued. Petitioner's veiled implication that to hold the Joint Resolution inapplicable to multiple currency clauses contained instruments issued in 1912 would put it at the mercy of the investing public as to future financing is laughable in view of the fact that the only corporations which issued such instruments in the past and are now attempting to defeat the claims of creditors, like in this case, on multiple currency clauses, are a few large corporations like Petitioner, Southern Pacific Company and St. Louis Southwestern Railway Company (the latter two also being Respondents in No. 384). The elimination of such multiple currency clauses in the future financing of these few corporations now amounting to five, at the most (see footnote 22, p. 53), is obviously a mere matter of future contract agreement and draftsmanship. Certainly no argument for relieving Petitioner from its present liability to foreign creditors who relied and were led to rely on the multiple currency features in Petitioner's past financing can be predicated upon the imaginary fears to which Petitioner now pretends.

Petitioner itself answered the argument it now advances when, in its reply brief in the Court of Appeals in the instant case, it made the following statement (at p. 4):

> "The defendant makes no contention that the provision for payment of guilders in the obligations in suit is proscribed by the Joint Resolution."

Such being admittedly the case, and on the only proper reading of the coupons, Respondents must recover the full amount sued for.

The situation was summed up by Southern Pacific Company (one of the Respondents in No. 384, argued concurrently herewith), when it made the following statement at page 77 of its brief to the Circuit Court of Appeals, 9th

in *McAdoo v. Southern Pacific Co.* (cited and discussed at pages 64-66 *et seq., infra*), commenting on coupons of the same issue as are involved in No. 384:

"The promise was no more to pay in United States money than it was to pay in German marks, etc."

The coupons at bar were never payable or capable of being paid in money of the United States, there never having been an election to receive the same by Respondents, in whom the right of election resided.[15]

(3) The Joint Resolution can in no way affect a contract to be performed in another country in the lawful money of that country.

Legislation is presumptively territorial only and is confined to the limits over which the law-making power has jurisdiction. The Joint Resolution could not impair the payment promised to be made in Holland. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *Sandberg v. McDonald*, 248 U. S. 185 (1918); *Bond v. Jay*, 7 Cranch. 350 (1813); *Hilton v. Guyot*, 159 U. S. 113, 163 (1895); *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company, supra*; see also *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, dissent, cited and discussed at p. 63, *infra*.

The Canadian courts were confronted with a question similar to that here presented, when the Canadian dollar depreciated in terms of the United States dollar.

Extensive research of American, English, French and Canadian authorities was made by Mr. Justice Maclennan in *La Corporation des Obligations Municipales Limitée v. Ville de Montreal-Nord*, 59 Cour Superieure 550 (Quebec, 1921). The plaintiff in that case was the holder of coupons of the face value of $213 payable at the holder's option at the Banque d'Hochelaga, in the City of Montreal, or at the office

[15] See Harvard Law Review, Vol. 49 (November, 1935), at page 153, which, in commenting upon the *City Bank*, *McAdoo* and *St. Louis Southwestern* cases [discussed *infra*, Point B (10), p. 59], states:

"The joint resolution does not seem to affect these obligations, for, in the commercial sense, they were not 'payable' in United States money in the absence of an election to receive it."

of the National Park Bank, in the City of New York, or at the Clydesdale Bank, Ltd., in the City of London. Plaintiff presented the coupons in New York and demanded American dollars which were then at a premium. Defendant, City of Montreal, refused to pay in any other than the face amount in Canadian currency. On the due date it required $242.82 in Canadian currency to produce $213 in American currency. The Court held that plaintiff was entitled to receive $213 in American currency and, since plaintiff could recover its damages only in Canadian currency, judgment was given for a sum of money which would produce the amount of the coupons in American currency on the due date, to wit: the sum of $242.82 in Canadian currency.

In *Les Commissairs D'Ecole de la Municipalite Scolaire de St. Charles* v. *La Societe des Artisans Canadiens-Francais*, 33 Quebec K. B. 448 (1922), suit was brought in Canada on $30 coupons payable in gold, at the holder's option, at the chief office of the Banque d'Hochelaga, at Montreal, or at the National Park Bank in the City of New York. The plaintiff exercised its option and on the due date presented the coupons in New York where American currency was at a premium of 13½%.

Mr. Justice Martin said (p. 449):

> "* * * The unequivocal promise of the appellants expressed in plain and clear language was to pay the debt in New York and whatever the rate of exchange may have been, and it is a matter of common knowledge during the past few years it has fluctuated, it must pay at the time and place indicated in its obligation, and it does not satisfy that obligation by offering to pay in another manner, and it is rather a novel proposition to seriously contend that it can do so,"

and

> "The proposition is so elementary that one would hardly think it called for extended consideration."

Mr. Justice Greenshield, concurring, said (at p. 451):

> "* * * The rate of exchange which happened to prevail at the time of maturity of the obligation in

> no way affected the rights or obligations between the parties as contained in the contract. * * * Whether that $30 had a greater purchasing power in a foreign country is, in my opinion, entirely outside the mark and has nothing whatever to do with the contractual obligations of the parties."

In *Jackson* v. *United States*, 60 Ct. of Cl. 599 (1925), plaintiff entered into a contract with the United States to erect radio towers in France. The contract provided for payment in dollars. The Government paid plaintiff in depreciated francs. Plaintiff took the francs, and sued for the difference.

The Court found the Government's contention "most singular, why the contractor was not paid as the contract provides." In rendering judgment for plaintiff, the Court stated:

> "By what process of reasoning the meaning, scope and obligation clearly imposed by the provision could be perverted and ignored presents a problem of no easy solution. * * *
>
> "The contract provided that the contractor was to receive as payment for his undertaking so many *dollars*, and the payment of any less sum would not, and could not, by any lawful mean discharge the obligation or relieve the liability."

By the same token, it is manifest that a sum of dollars which is insufficient to produce for Petitioner the exact number of guilders specified in the coupons cannot constitute a discharge of the obligation.

The language of Lord Chancellor Eldon in *Cash* v. *Kenion*, 11 Vesey 316 (1805), is peculiarly appropriate:

> "I cannot bring myself to doubt that where a man agrees to pay one hundred pounds in London on the first of January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

(4) Payment in guilders is not equivalent to payment in gold.

Petitioner concedes that if the coupons were payable in guilders only, the Joint Resolution would not apply.[16] As already indicated, the only thing which the Joint Resolution accomplished was to strike the words "gold coin" from the dollar amount. *Norman* v. *Baltimore & Ohio R. R., supra.* Such being the case, and substituting the words "lawful dollars" for "gold dollars" wherever they appear in the coupons (as accomplished and intended to be accomplished by the Joint Resolution), it is apparent that Petitioner must fail in its contention that the words "gold coin," attached to the dollar amount, permit it to pay that dollar amount in lieu of the number of guilders set forth in the coupons, even after the holder had exercised his choice to take guilders—for the simple additional reason that payment in guilders is not equivalent to payment in gold.

At the time when the coupons were issued or sold and at all pertinent times, the guilder was and is the monetary unit of Holland, and the Nederlandsche Bank was and is entitled to act as its circulation bank. During all pertinent times the Nederlandsche Bank had the exclusive right to issue notes, and by Article I of the Law of July 18, 1904, Section 189, it is provided that so long as the Nederlandsche Bank is entitled to act as circulation bank, its notes have the quality of legal tender and lawful money; and its notes now are legal tender, except as to payments to be made by the Nederlandsche Bank itself. The currency units of The Netherlands are provided for by the monetary laws thereof. In addition to the notes of the Nederlandsche Bank, certain silver coins have the quality of legal tender "up to any amount"; **there is not even a gold guilder;** and an important gold coin, the gold dukaat, is expressly provided to be "without the quality of legal tender". In fact, also, Holland has suspended gold exports (R. 51; see also No. 384, R. 165 *et seq.*).

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[16] Even Judge Stone in the opinion below for the Circuit Court of Appeals in No. 384 indicates that this might well be the fact (No. 384, R. 254). After the election to take guilders, the promise at bar did in fact become one to pay guilders only.

The correct conclusion was reached by Judge Learned Hand in the *St. Louis Southwestern* case, at pages 11-12, as follows:

> "As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. **If he chose any of the foreign currencies he could not get gold;** he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible,' not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved pro tanto, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. **If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt."**

And again at page 12:

> "* * * foreign money[17] is a commodity like wheat or shoes, and lawful to buy unlike gold."

To the same effect, see *Restatement, Conflict of Laws*, Sec. 423, comment (a).

The situation in the United States with respect to the export of gold by the Federal Reserve Bank is identical with that in Holland with respect to the export of gold by the Nederlandsche Bank.

The present lawful dollar of the United States is measured in gold, 15-5/21 grains nine-tenths fine (Presidential Proclamation of January 31, 1934) although not redeemable in gold.

Under the Gold Reserve Act of 1934 and the Provisional Regulations issued thereunder (Art. IV, Secs. 28 and 29), gold may be held, transported, imported, exported, or earmarked, or held in custody for foreign or domestic account by Federal Reserve banks for the purpose, among other things, of settling international balances.

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[17] As to "guilders."

If the argument advanced by Petitioner prevails, then, by the same token, payment in present lawful money of the United States (Federal Reserve notes) must likewise be regarded as equivalent to payment in gold and in violation of the Joint Resolution. Of course, Petitioner will not seriously argue that payment in present lawful Federal Reserve notes would constitute payment in gold or its "equivalent". However, its argument, followed to its logical conclusion, would relieve it from any payment whatever.[18]

As a matter of fact, Respondents could not have demanded gold guilders, or any particular kind of guilders, nor could they have obtained them even if demanded. Neither gold, nor gold guilders, nor any particular kind of guilders were demanded (see typical forms of protest, R. 88-89, 89-90). *Cf. First Nat. Bank of Chicago* v. *Anderson*, 285 Ill. App. 584 (1936); rehearing denied May 5, 1936. Payment in any kind of lawful guilders (i. e., notes of the Nederlandsche Bank)—see typical forms of protest, R. 88-89, 89-90—would have lawfully satisfied the demand.[19]

The fact that guilders are not the equivalent of gold is exemplified even by the brief to the Appellate Division for this very Petitioner in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634 (1935) (where

[18] It may be noted that, although the coupons sued upon in the Zurich case (No. 590) contain an alternative in the holder to demand and receive guilders, the number of guilders specified in said coupons is **62**, the number of dollars specified being $25 (No. 590, R. 8, 12). In the case at bar (No. 591) the number of dollars is likewise fixed at $25, but the number of guilders is fixed at **62.25** (R. 7, 30).

It may be argued that the variance is slight, and that it should therefore be disregarded. But here we have the coupons, payable by the same debtor, expressed, as to dollars, in similar amounts, but alternatively in a differing number of guilders. It is thus further clearly demonstrated that payment in guilders is not payment in gold, and that the payment of guilders presently demanded would not be a payment in gold or in gold coin. The Lackawanna coupon holder, once having elected to take guilders, can receive from Petitioner only **62** guilders, and not 62.25 guilders. The Bethlehem Steel coupon holder, once having elected to take guilders, can receive from Petitioner **62.25** guilders, and may not be paid any lesser or different amount or any other currency.

[19] In *Stone* v. *Watt*, 81 S. W. (2d) 552 (Court of Civil Appeals, Texas, 1935), not officially reported, the Court said, at page 553:

> "* * * The provision for the payment in gold certainly did not release the appellant from the payment of the debt in other lawful currency."

recovery was denied to a domestic)[20] where the following admission is made in respect of identical coupons from this very issue of bonds:

> "By the terms of these bonds, **dollars only were made payable in gold coin. There was no gold provision for sterling and guilders**" (at p. 40).
>
> * * * * * *
>
> "The Corporation, on the other hand, was protected by the circumstance that it did its own business in the United States and derived its own income in dollars, so that **the only gold obligation in the bonds was one in respect of its own currency,** of which it would always have an adequate supply" (at p. 41).

In its reply brief in the Court of Appeals in the instant case Petitioner makes a similar admission (p. 4):

> "We do not argue that 'payment in guilders is * * * equivalent to payment in gold.'" (Asterisks not ours.)

No court has ever held that payment of guilders in Holland was simply and plainly abolished by the Joint Resolution. The decisions refusing recovery for guilder value[20] were all based upon the fact that the same instrument contained a separate, alternative, distinct (and unexercised) right to the holder of the instrument to take "gold" or "gold coin" dollars.

Inasmuch as payment *simpliciter* in guilders is not interdicted, then, by the same token, a guilder option, the exercise of which results in an identical simple obligation on Petitioner's part to pay the identical guilders, must likewise be equally free from taint.

The situation is well summed up by Judge Learned Hand in the *St. Louis Southwestern* case (at p. 12):

> "Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it." (Asterisks not ours.)

[20] All decisions refusing recovery on the foreign money alternatives in multiple currency instruments, except No. 384, were of lower and intermediate appellate state courts in New York, and have all been overruled in New York by the decisions of the Court of Appeals in No. 590 and in the instant case, No. 591.

Petitioner's real grievance is that performance costs it more than it is willing to pay. Such a defense is without merit. *Norcross* v. *Wills*, 198 N. Y. 336, 341 (1910); *Williston on Contracts*, Sec. 1963 (1938).

(5) Payment in guilders does not affect the equal parity of the dollars of the United States with each other.

In *Norman* v. *Baltimore & Ohio R. Co.*, *supra*, this Court, in concluding its opinion, had the following to say (at p. 316):

> "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make **that currency, dollar for dollar,** legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority."

This Court thus enunciated the principle for which we here contend, viz., that the intention of the Joint Resolution was to establish a "parity between kinds of currency" (of the United States) "and to make that currency" (of the United States) **"dollar for dollar"** legal tender for the payment of debts.

There is no evidence of an intention in the Resolution, nor did this Court in the *Norman* case find that any such intention existed, to establish **guilders** as "legal tender for the payment of debts." Each "dollar" was established as being in parity with every other "dollar." There was no intention to establish a parity between a "dollar" and any foreign currency or indeed any other commodity. *Cf. Petkus* v. *Lietuvos Ukio Bankas*, *supra*.

The Joint Resolution did not establish or attempt to establish guilders as "legal tender." Whether or not Congress might have had the power to do so, had it wished, is quite beside the point.

The argument, advanced by Petitioner in the courts below (now apparently abandoned), that payment in guilders would create a "dual currency" is therefore likewise beside the point. There is no "dual currency" (of the United States or elsewhere) involved in compelling Petitioner to pay guilders in Holland, or damages in the United States for failure to do so.

The fact that a dollar of Petitioner's, when applied to this single purpose, may not purchase as many guilders as Petitioner hopes and wishes it to purchase is likewise quite beside the point. The situation is no different than if, on June 4, 1933, Petitioner had issued a bill of exchange, payable in Holland, to pay 62.25 guilders on June 6, 1933, or at some time thereafter. The Joint Resolution meantime having been passed (on June 5, 1933), Petitioner would not be heard to say, and would not seriously urge, that it was entitled to discharge its obligation to pay 62.25 guilders by the payment of any lesser number of dollars than 62.25 guilders would buy. If $25 would purchase 62.25 guilders on June 4, 1933, and it required $35 to purchase 62.25 guilders on June 6, 1933, it would be absurd for Petitioner to argue that a "dual currency" had thereby been created, or that it was relieved from payment *pro tanto* because the Joint Resolution had meantime been passed. The simple circumstance that the separate, distinct and unexercised alternative to take gold dollars (which the Joint Resolution converted into a promise to pay "paper" dollars) is contained upon the same piece of paper in nowise alters the situation. The election to take guilders, once having been made, became irrevocable, and the duty of Petitioner was then to pay the guilders in Holland in accordance with the single performance then required. *Cf. Petkus* v. *Lietuvos Ukio Bankas, supra; Anglo-Continentale Treuhand* v. *St. Louis Southwestern Railway Co., supra.* Until such election, the coupons represented a continuing offer on Petitioner's part, and until

that offer was crystallized by the exercise of the election. Petitioner was under no duty to pay any sum whatever anywhere. It could not have compelled Respondents to take dollars in the United States; it could not have compelled Respondents to take pounds sterling in London; it could not even have compelled Respondents to take guilders in Holland.

The obligations contained in the coupons could not be satisfied by Petitioner until some affirmative act had been taken by Respondents evidencing the medium of payment which Respondents desired and the place where such payment should be made—all specifically as provided for in the bonds and coupons themselves.

(6) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right of foreigners, resident abroad, to demand and receive guilders in Holland. No public policy inhibits such payment.

> "There is in the Congressional data not the slightest suggestion that Congress had considered an impairment of multiple currency clauses. Those clauses are not mentioned in the Congressional material, either directly or indirectly. * * * Thus, there is at least no documentary evidence for the assertion, which certainly requires proof, that multiple currency clauses were within the intent and spirit of the Joint Resolution." *Nussbaum*, 84 U. of Pa. L. R., *supra*, p. 573.
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> * * * * * * *
>
> "However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint." *Ibid.*, at p. 575.

In the case of multiple currency clauses, there is no justification to deny or invalidate the liability incurred. "Those obligations have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom.[21] It cannot even be alleged that the rate of exchange risk incurred was not considered by the borrowers. For it is remarkable that in most cases

[21] Such as prevailed with respect to gold coin clauses (discussed in the article at p. 576).

the multiple currency clause was conceded only as to interest, not as to principal. Such a limitation will not be found in any gold bond. That the Joint Resolution cannot be regarded as having simply and plainly abolished the multiple currency clauses is clearly recognized both by the debtors invoking the Resolution and by the New York court"—(referring to the now overruled decision in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co., supra. Nussbaum, ibid.*, at pp. 576-577).

Manifestly, had Congress intended to legislate with respect to multiple currencies, it would have included them in the definitions contained in the Joint Resolution. The omission is most significant. There has been no hesitancy on the part of Congress to legislate specifically with respect to any matters deemed by it to be against public policy.

In *Sutherland, Statutory Construction, supra,* the rule is stated at page 931 that it is presumed that the Legislature does not intend to make any change in the existing law beyond what is expressly declared, and hence repeals by implication are recognized only when there is an unavoidable contradiction. It is stated that the presumption is against any radical change of legislative policy.

Petitioner would, firstly, read into the Joint Resolution a contradiction which does not exist; it would then read into the Joint Resolution a change "beyond what is expressly declared" therein; it would presume a "radical change of legislative policy" (in respect of payment of foreign monetary units to foreigners abroad). And, based upon these faulty premises, it blandly asserts that the Joint Resolution condemns the payment required by Respondents.

Furthermore, the construction of the Joint Resolution for which Petitioner contends is in derogation of the common-law rights of Respondents, and in that aspect the Joint Resolution must be strictly, not liberally, construed. See *Sutherland, supra,* at p. 931.

The words of Lord Halsbury are applicable to the character of argument advanced by Petitioner, when he said, in *Leader* v. *Duffy*, 13 A. C. 294 (H. of L., 1888), at page 301:

> "Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. * * * But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption, to bend the language in favour of the assumption so made."

The foregoing principles must also have guided Judge Hand when he said:

> "Equally we should have no warrant in supposing that when the obligation was to pay foreign money, it was any nearer to the putative purposes of Congress than if it was to do anything else." *St. Louis Southwestern* case, at p. 12.

That multiple currency promises were never intended to come within the condemnation of the Joint Resolution is further evident from Executive Order No. 6560 promulgated January 15, 1934, by the President by virtue of Section 5(b) of the Act of October 6, 1917, 40 Stat. 411, 50 U. S. C. Appendix, Sec. 5, as amended by Section 2 of the Act of March 9, 1933, 48 Stat. 1, 50 U. S. C. Appendix, Sec. 5, prescribing regulations for the investigation, regulation and prohibition of transactions in foreign exchange and transfers of credit.

Certain transactions were prohibited except under license, provided, however, that

> "foreign exchange transactions and transfers of credit may be carried out *without a license* for (a) normal commercial or business requirements * * * (c) the fulfillment of legally enforceable obligations incurred prior to March 9, 1933."

The coupons were issued in 1912. Servicing of a funded debt is surely a "normal commercial or business requirement." Payment of the coupons thus falls within the express permission of these regulations.

The dissenting opinion in No. 590 states that a detailed analysis of the language used in the Joint Resolution would seem to show that the ordinary meaning of the language would reach and apply to every obligation issued before or after June 5, 1933, "capable of being paid in the United States" (No. 590, R. 72). The two dissenting judges, however, failed to point out that the coupons at bar were not, and never became, "capable of being paid in the United States" in the absence of an election on the part of the holders thereof to receive such payment. The choice of the place of payment, as well as the choice of the medium of payment, resided in the holders of the coupons. Petitioner could never have discharged the coupons by tendering dollars in the United States. The situation might have been different if the choice of the place and medium of payment had resided in Petitioner, or if Respondents had chosen gold dollars in America. In such an event, the coupons would have been "capable of being paid in the United States."

This must have been recognized even by the Appellate Division in the instant case, though it held that the Joint Resolution applied to the multiple currency clauses in the coupons. Pursuant to a memorandum of Mr. Justice Cohn (who was one of the majority judges in the Appellate Division and who voted against recovery by Respondents), it was provided (see *infra*, p. 96) that the proposed order submitted to the Appellate Division "should be revised to include interest [to Respondents] on the face [dollar] amounts awarded from the date the coupons were presented for payment."

One reason why the Appellate Division directed that interest be awarded is quite evident from the following facts:

In the typical allegation, contained in paragraph 62 of the amended answer, (R. 40), Petitioner alleged that on the respective due dates of the coupons it was ready, able and willing to pay the same as they respectively became due, *in money of the United States* upon presentation and surrender of said coupons respectively *at the office or agency of the Petitioner in the City of New York in said United States*. The Appellate Division must have believed that this

allegation does not constitute an allegation of tender, nor of any alleged "tender" being kept good.

If the coupons were capable of being paid in money of the United States, in the sense for which Petitioner contends, then an allegation of readiness and willingness to pay dollars in the United States would seem to have been a sufficient allegation of tender. There is, therefore, implicit in the holding of the Appellate Division that Respondents are entitled to interest, the further holding that a willingness to pay in money of the United States in the United States is not a good tender—*ergo* that, Respondents having elected to take guilders in Holland, the coupons were never payable, and never became capable of being paid, in money of the United States.

That Congress did not intend to affect the foreign money alternatives in the coupons is further evident from the fact that guilders are legal tender of The Netherlands. Coupons payable in that country in guilders can be discharged only by payment of Dutch currency, or of damages in this country in lawful American dollars.

Congress must be presumed to know the law, *Sutherland, Statutory Construction, supra,* at p. 929, which, on this point, is as follows:

> "The law of the place of performance determines the medium of payment in which a contract to pay money is to be performed." *Restatement, Conflict of Laws,* Sec. 364.

The law of the place of performance determines the manner of performance, as well as the excuse for non-performance. *Restatement, Conflict of Laws,* Sec. 358(a) and (e); *Andrews* v. *Pond,* 13 Pet. 65, 77 (1839).

The laws of Holland, the place of performance selected by Respondents, provide in Articles 1308-1313 of the Dutch Civil Code that in the case of alternative obligations, where the choice has been left to the creditor, if one of the two things has perished or can no longer be delivered, the creditor is entitled to the other (R. 51).

Such, also, is our own law:

> "Where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible does not excuse the promisor from performing that which remains possible; * * * *Williston on Contracts*, Sec. 1961 (1938).

The words of Judge Hand in the *St. Louis Southwestern* case (at p. 13), holding for foreign plaintiffs, apply with particular force:

> "Congress either forbad the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens. **There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."**

Just as Judge Hand allowed recovery in the *St. Louis Southwestern* case, and just as the Court of Appeals allowed recovery below, payment in the currency of the place of performance (based on the principle that the law of the place of performance governs) is the recognized rule in our Federal and State courts. Both have, for instance, permitted recovery in the United States for the full dollar amount of dollar instruments against contentions that by the laws and currency restrictions of the foreign countries of which the defendants were citizens (but which were not the places of performance) such payments might not lawfully be made, and that such payments imposed hardship upon the debtors. *Central Hanover Bank & Trust Co.* v. *Siemens & Halske Aktiengesellschaft et al.*, 15 F. Supp. 927 (Dist. Ct., S. D. N. Y., 1936), aff'd on opinion below 84 F. (2d) 993 (C. C. A. 2d, 1936), cert. den. 299 U. S. 585 (1936); *Perry* v. *Norddeutscher Lloyd* (*Bremen*) (*North German Lloyd*), 150 Misc. (N. Y.) 73 (1934); *Glynn* v. *United Steel Works Corporation*, 160 Misc. (N. Y.) 405 (1935); *Marks* v. *United Steel Works Corporation*, 160 Misc. (N. Y.) 678 (1935);

Sheppard v. *Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, N. Y. Law Journal, Mar. 14, 1934, p. 1232 (Collins, J.) (not elsewhere reported); *Lann* v. *United Steel Works Corporation*, 166 Misc. (N. Y.) 465 (1938); *Goodman* v. *Deutsch-Atlantische &c.* and *Douglis* v. *Same*, 166 Misc. (N. Y.) 509 (1938); *Mayor* v. *Hungarian Commercial*, No. L. 7424, U. S. D. C., E. D. N. Y., decided July 7, 1934—Galston, J. (not elsewhere reported); *Pan-American Securities Corporation* v. *Fried. Krupp*, 6 N. Y. Supp. (2d) 993 (1938) (not officially reported).

Petitioner has heretofore referred disparagingly to the fact that foreign holders electing to take guilders abroad might make a speculative profit if the claim for guilders were to be allowed. In answer, we can use no better language than that used by Mr. Justice Steinbrink in *Pan-American Securities Corporation* v. *Fried. Krupp*, cited *supra*. The learned Justice had before him a bond issued by a German corporation payable in dollars in America. The German Devisen Laws were pleaded as a defense, and defendant also urged that plaintiff intended to make a speculative profit by the purchase of the securities.

Finding for the plaintiff upon a motion for summary judgment, the Court held, among other things, that the alleged fact that the plaintiff seeks to make a speculative profit is no concern of the Court, "for the answer to such arguments is that if the plaintiff seeks to make a huge speculative profit, so, too, *the defendant seeks to make a larger profit by compelling the plaintiff to accept payment in a depreciated currency.*"

The situation at bar is no different than that which obtains when an investor purchases securities below par and expects full payment on the maturity date. In such a case, just as at bar, the holder is entitled "to recover from the maker to the entire extent of his promise to pay." *Security-First National Bank of Los Angeles* v. *Rindge Land & Navigation Co.*, 85 F. (2nd) 557, 561 (C. C. A., 9th, 1936), cert. den. 299 U. S. 613 (1937), rehear. den. 300 U. S. 686 (1937).

The bonds, from which the coupons sued upon were detached, were acquired *before August 11, 1934* (R. 63-69).

the date upon which Petitioner announced its unwarranted refusal to further pay guilders to foreigners abroad except upon compliance with certain unauthorized requirements imposed by it (R. 59). A number of them were acquired after Petitioner had specifically announced and represented on January 7, 1934, its intention to pay foreign monies to owners residing in foreign countries—not even confining such owners to aliens—(see R. 57-58); and the prices prevailing ranged from about 100½ to 112½ (see affidavit of one of Petitioner's attorneys, R. 85-86).

Petitioner thus early conceded its liability upon these coupons; not only should it thus be estopped from attacking the judgment appealed from, but it comes with very poor grace on its part to do so. It is a defaulting debtor, trying, on flimsy grounds, to avoid a legal obligation wilfully and consciously originally assumed by it. Equity and good conscience, as well as the governing principles of law, thus require that the judgment appealed from be affirmed.

Public policy permits recovery in the United States upon instruments, payment of which is lawful by the law of the place of performance. Furthermore, there is no public policy restricting or prohibiting the payment of guilders, either in the United States or abroad.

(7) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the payment to foreigners abroad of the foreign money alternatives contained in the coupons sued upon.

No dislocation of domestic economy is involved by sustaining the validity of the foreign currency alternatives of the coupons,—especially where, as at bar, foreigners are involved and the payment is demanded abroad.

Thus the petitioner in No. 384, at page 29 of its brief in support of its petition for a writ of certiorari, makes the following correct statement:

> "Multiple currency clauses, unlike gold clauses, applied to a very limited number of contracts and security issues in the year 1933. While the gold clause

> has been estimated to have been in contracts for seventy-five billions of dollars or more (see *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 313), foreign currency options do not amount to 1% of this sum. See Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. Law Rev. 569, 575-6 (March, 1936."[1]

"(1) According to the computation of the Debtor's Trustee, at p. 6, in his unsuccessful petition for certiorari in *Henwood, Trustee* v. *Anglo-Continentale Treuhand, A. G.*, 298 U. S. 655 (1936), only $90,000,000 face amount of outstanding bonds have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. This is a little more than 1/10 of 1% of the aggregate of bonds containing the gold clause."

And Respondents in No. 384, at page 17 of their joint brief in opposition to petition for writ of certiorari in that case, make the following statement:

> "The importance of the precise question at issue, viz., the application of the Joint Resolution to United States money contracts containing foreign money options, *has become of somewhat lesser importance in the last few years.* A number of bond issues having such options have been redeemed recently, *and there are only two uncalled issues,* in addition to the St. Louis Southwestern Railway Company issue, which are payable in money of the United States, or optionally in a foreign money now at a premium, viz., an issue of Southern Pacific Company and an issue assumed by Niagara, Lockport and Ontario Power Co. Also some bonds of this character of the Bethlehem Steel Company, which have been called for payment, are still outstanding. Moreover, the foreign moneys in which these issues are optionally payable, Dutch guilders and Swiss francs, now command a smaller premium than they did several years ago."

In the *Norman* case this Court did not purport to pass upon multiple currency instruments, payable abroad in a foreign monetary unit. Nowhere in the decision is there any indication that the Court entertained the view that the Joint Resolution condemned payment of foreign currency to foreigners abroad—multiple currency clauses were not before the Court for construction. In the argument for the Government, repeated references are made only to the "gold clause" (i. e., at pp. 273-274-275).

There is thus now only an insignificant amount of bonds and coupons containing multiple currency clauses (with alternative payments in currencies selling at other than a slight premium) in the hands of the public, and they constitute only an insignificant fraction of the funded debts of the corporations involved.[22] Bonds and coupons containing foreign money alternatives in currencies selling at a slight premium only (as pounds sterling) or at a discount (as francs or marks) cannot possibly "dislocate" the domestic economy in any way, since the amount required to discharge the same (if the holders elect to take the foreign currencies abroad) is less than the face dollar amount therein mentioned.

This Court said in the *Norman* case (at p. 312):

> "If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence * * *."

Every debtor (save one, the extent of whose liability is based upon $2,605,000 of bonds as expressed in dollars, and save one other debtor whose bonds [not containing multiple currency clauses] have been called for payment, but some multiple currency coupons from which are still outstanding) who may be affected by the decisions at bar is now before this Court; and inasmuch as these multiple currency clauses

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[22] Moody's Manuals show that the following amounts of such bonds are outstanding:

Name of Corporation	*Total funded debt, in dollars (in round thousands)*	*Multiple currency bonds, in the hands of the public, in dollars (in round thousands)*
Bethlehem Steel Company, 5% (Petitioner herein).....	$166,000,000 (Called for payment by Petitioner)	$ 8,000,000
Lackawanna Steel Company, 5%, assumed by Bethlehem Steel Co. (Petitioner herein)		
Southern Pacific Company, 4% (a respondent in No. 384)...	700,000,000	25,000,000
Niagara, Lockport & Ontario Power Company.....	23,816,500	2,605,000
St. Louis Southwestern Railway Co., 5% (a respondent in No. 384) (in reorganization).....	77,000,000	8,063,000

quite apparently apply "to a very limited number of contracts and security issues," there exists no economic justification for holding that the Joint Resolution condemns or prohibits the foreign money alternatives contained in these multiple currency clauses.[23]

(8) To hold that the foreign money alternatives contained in multiple currency clauses are condemned by the Joint Resolution would deprive these holders of these coupons of their property without due process of law in violation of the Fifth and Tenth Amendments.

Specific property was pledged as security for the payment of the Bonds and coupons (R. 79) under a mortgage made in May, 1912, more than twenty-one years prior to the passage of the Joint Resolution (R. 78-79). Payment is guaranteed by Bethlehem Steel Corporation (R. 77).

The property right of a mortgagee to insist upon full payment before giving up his security is of the essence of a mortgage. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 580 (1935). Even for a wholly public use such private property cannot be taken without just compensation (*ibid.*, at p. 602),—much less can it be taken for a private use.

The "taking" here attempted by Petitioner is for a private and not for a public use. That "taking," if Petitioner's contentions be sustained, would operate to take Respondents' "rights in specific property which are of substantial value", *Louisville Joint Stock Land Bank* v. *Radford*, *supra*, at p. 601, from one person (Respondents) and give them to another (Petitioner), in violation of the Fifth and Tenth Amendments of the Constitution.

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[23] The insignificant amounts involved in payment of these coupons in guilders will appear in sharp relief when compared with foreign exchange movements generally—see "Statistics of Capital Movements between the United States and Foreign Countries and of Purchases and Sales of Foreign Exchange in the United States, Third Quarter, 1938, Report No. 9" published by the United States Treasury Department, particularly Table I, page 11.

In addition to having a security right in specific property, the bondholders have a *property* right, represented by Petitioner's various promises to pay, as contained in the coupons. They are entitled to recover from the maker to the entire extent of that maker's promises to pay.

As was said in *Security-First Nat. Bank of Los Angeles et al. v. Rindge Land & Navigation Co. et al., supra:*

> "The legal value or property right in an obligation is the right to recover from the maker to **the entire extent of his promise to pay.** The consideration given for a security by the holder thereof is immaterial. Wade v. Chicago, Springfield & St. Louis R. Co., 149 U. S. 327, 343, 13 S. Ct. 892, 37 L. Ed. 755; In re Tennessee Publishing Co. (C. C. A. 6), 81 F. (2d) 463, 466."

The "entire extent" of Petitioner's "promise to pay" comprises not only the promise to pay the dollars in the United States, but also, at the option of the holders, to pay the guilders in Holland. To deprive the coupon holders of so much of the promises to them as represents their right to receive guilders in Holland is to deprive them of a valuable property right without due process of law.

The Joint Resolution should, if possible, be construed so as to avoid this unconstitutional result of confiscating the property of the bondholders and coupon holders for the benefit of Petitioner. To this end, that construction thereof which will save the Resolution should be adopted. *National Labor Relations Board* v. *Jones & Laughlin, etc.*, 301 U. S. 1, 30 (1937).

As stated by Mr. Justice Holmes in *United States* v. *Moy*, 241 U. S. 394, 401 (1916):

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909); *Hovey* v. *De Long Hook & Eye Co.*, 211 N. Y. 420, 429 (1914).

See further *Hare, American Constitutional Law* (1889), Vol. II, pp. 1233-1239, in which it is said:

> "It results from these considerations that the power of Congress over the currency is supreme. It has no limit, because none is set to it in the Constitution. * * *
>
> "*The parties might have placed themselves beyond the reach of Congress by stipulating for payment in wheat* * * * and submitting to the uncertainty, delay, and other inconveniences inseparable from such a mode of contracting; among which may be mentioned * * * the necessity for calling a jury to assess the damages. * * * If the question of value is left to the government by bargaining for money, * * * the parties must submit * * *. This will be true, even when a particular kind of money is contracted or, so long as the contract is for lawful money of the country, because the limitation will be rejected as inconsistent with the general design of the contract. That a particular must yield to a general intent, when both cannot stand consistently with each other, or with the law, is a well-settled rule in the construction of grants and contracts; and no repugnancy can be greater than that which must result from an attempt to unite the different and irreconcilable attributes of money and merchandise, of bullion and coin, * * * (citing *Shoenberger* v. *Watts*, 5 Phila. 51, 56 [1882])."

Thus the powers of Congress cannot constitutionally be expanded to condemn payment to foreigners of guilders abroad nor to deprive these holders of these instruments of their express valuable contract and property rights in the manner contended for by, and for the private benefit of, Petitioner.

(9) This Court's decision in the "Holyoke" Case supports our position.

Petitioner urges that *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324 (1937) (hereinafter referred to as the "*Holyoke* case"), is persuasive of the issues here presented.

An examination of that case shows at once that *no question of multiple currencies was even remotely involved.*

Certain leases were executed by the Water Power Company to the Paper Company.

> "By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent 'a quantity of gold which shall be equal in amount to fifteen hundred ($1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency.'" (p. 333).

Applying the Joint Resolution, this Court held (pp. 335, 339) that the obligation was for the payment of money and not for the delivery of gold as upon the sale of a commodity, and that (p. 337) the contract, being for the payment of **money of the United States** measureable in gold, "is within the letter of the Joint Resolution."

Our contentions at bar are entirely consistent with the decision thus reached. Applying the definitions appearing in the Joint Resolution itself, it readily appears that one alternative of the contract in the *Holyoke* case was for the payment of a quantity of "gold" which should equal a specific amount of "a particular kind of coin or currency of the United States," and therefore came within the specific condemnation of the Joint Resolution. The other alternative was for the payment of "a particular kind of coin or currency of the United States," or "in an amount in money of the United States measured thereby," and therefore also quite properly came within the condemnation of the Resolution.

This Court's approach to the problem in the *Holyoke* case is set forth at page 340 of the opinion:

> "If the currency[24] to be paid by the lessee is to be the equivalent of gold, and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then *the covenant to pay the currency*[24] is tantamount to a covenant to pay the dollars, and dollars of the stated standard."

Thus, in the *Holyoke* case, this Court condemned only that *"covenant to pay the currency"*[24] *(of the United States)* which was equivalent to the "gold" or the "particular kind" of currency referred to in the lease. Mr. Justice Cardozo even went so far as to indicate that if the covenant had even been one to pay *gold as a commodity* (if the recipient were engaged in an art requiring gold) it would not have been condemned.[25]

In fact, as indicating that this Court had no intention of even remotely touching the multiple currency question (as to which it had denied certiorari in the *St. Louis Southwestern* case less than a year earlier), we quote the following from the opinion at pages 335-336:

> "Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: 'If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. * * *.' (*Legal Tender Cases*, 12 Wall. 457, 566 [1870].)"

Paraphrasing the words of Mr. Justice Cardozo, the contract at bar is for "a specific commodity or substance" (Dutch guilders) and the Joint Resolution does not apply.

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[24] Under the definitions in paragraph 1(b) of the Joint Resolution, the "currency" to which the Court refers is "coin or currency" *of the United States."*

[25] We do not concede that the word "payable" means "capable of being paid," as Petitioner contends. But it is worth noting that in the *Holyoke* case the *obligor* had the choice of the media of payment. The obligation in that case might therefore have been "capable of being paid" in money of the United States—different from the case at bar, where the coupons were never "capable of being paid" by the debtor until an election had been made by the foreign creditor, and thereafter were "capable of being paid" in Dutch money only and in Holland only.

In exact line with the reasoning in the *Norman* case—to the effect that *only one term* of the promise was impossible to perform and illegal (i. e., the "gold coin" *term*), all the separate promises to pay in foreign currencies remaining unaffected,—this Court, in reaching its conclusions in the *Holyoke* case, stripped the instrument of its "gold" and "gold coin" TERMS, the remainder of the instrument remaining intact and unaffected, and becoming one to pay the stated number of dollars.

In exact compliance with the Joint Resolution, also, the Court ordered that the obligation be discharged "DOLLAR FOR DOLLAR"—a dollar of present lawful money for a dollar of a "particular kind" referred to in the lease—specifically as provided for in the Joint Resolution,—no more and no less was decided.

Petitioner urges that in the *Holyoke* case this Court condemned "verbal variants" of the gold clauses, and Petitioner seeks to broaden the *Holyoke* decision, as if the multiple currency clauses were "verbal variants" of the "gold clause"—which in fact they are not. The multiple currency clauses are independent promises in every way, and are not measured by or dependent upon one another, as were the promises in the *Holyoke* case.

Accordingly, on analysis, not only is the *Holyoke* case incapable of the application to the case at bar for which Petitioner contends, but, properly read, it actually supports our position that the Joint Resolution does not apply to the foreign money alternatives in multiple currency clauses.

(10) Decisions of Federal and State Courts construing the Federal statute here involved in relation to the foreign money alternatives in multiple currency clauses support our position.

The application of the Joint Resolution to the foreign money alternatives in multiple currency clauses has been the subject of litigation in four jurisdictions, viz., the State courts of New York, the Federal courts in California, the Federal courts in New York, and the Federal courts in Missouri.

Save and except in one case,[26] the governing decisions all jurisdictions sustain the proposition that the Joint Re lution is not applicable to foreign money alternatives c tained in the multiple currency features of the promises, a does not prohibit or bar the payment abroad of the speci number of foreign monetary units specified in the inst ments, even though, in the same piece of paper, there is c tained an unexercised separate and distinct option to t gold dollars.

(a) The law in the State of New York has been settled recently as January 11, 1939, by the opinion of the Court Appeals of that State, to the effect that the Joint Resoluti is not applicable to multiple currency clauses in two ca now under review by this Court. *Zurich General Acciden Liability Insurance Co.* v. *Bethlehem Steel Co.*, 164 Mi (N. Y.) 498 (1937), aff'd 254 App. Div. 839 (1st De 1938), reversed .... N. Y. (1939), No. 590 in this Cou and the instant case, *Anglo-Continentale Treuhand, A. G. Bethlehem Steel Co.*, 6 N. Y. Supp. (2d) 334 (1938) (officially reported), modified, and affirmed as modified, 2 App. Div. 844 (1st Dept., 1938), judgment of Appellate D sion reversed and that of Special Term affirmed, with co .... N. Y. .... (1939), No. 591 in this Court.

The *Zurich* case involved multiple currency coupons fr an issue of multiple currency bonds issued by Lackawan Steel Company, Petitioner's predecessor, similar to those bar, i. e., payable in gold dollars in the United States America, or in a specified number of pounds sterling in E land, or in a specified number of guilders in Holland, or a specified number of marks in Germany, or in a specif number of francs in France, Belgium or Switzerland (590, R. 8, 12).

The plaintiff in that case, a foreign corporation, deman payment in Switzerland of the number of Swiss francs forth in the coupons, but payment was refused. The co at Special Term granted summary judgment for the f

[26] *Guaranty Trust Co. etc.* v. *Henwood*, 98 F. (2d) 160 (C. C. A. 1938); now on appeal to this Court, No. 384.

amount of the *dollars* set forth in the coupons, and dismissed the complaint as to the balance; the Appellate Division affirmed (two Justices dissenting); the Court of Appeals reversed the Appellate Division and the lower court, and granted plaintiffs' motion for summary judgment for the full value of the Swiss francs sued upon.

The following appears in the majority opinion:

> "The question is whether, on the facts of this case, the Joint Resolution is applicable to **this obligation to pay foreign currency to a foreign corporation in a foreign country.** The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.* (81 Fed. 2d, 11,—1936), wherein the facts were the same [as] at bar except that payment was made in Guilders at Amsterdam instead of Francs at Zurich. * * *
>
> "On the facts of this case, the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. **The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.**"

In the instant case (No. 591) argued and decided concurrently with the *Zurich* case, Petitioner's amended answer had been stricken and summary judgment had been rendered at Special Term for the full amount sued for, based on Petitioner's refusal to pay in Holland the specified number of guilders set forth in multiple currency coupons detached from multiple currency bonds of Petitioner (similar to the Lackawanna Steel Company bonds and coupons involved in the *Zurich* case). The Appellate Division (two Justices dissenting) modified the judgment, by reducing the same to the face amount of the *dollars* set forth in the coupons (though allowing interest from the date of presentation), and, as so modified, affirmed the judgment (a somewhat

anomalous holding, the effect of which was to compel Respondents to accept the face amount of the *dollars* in the United States set forth in the coupons, but to compel Petitioner to pay interest for its refusal to pay the guilders demanded in Holland by the Respondents). The Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of the Special Term, with costs to the Respondents.

The following appears in the *per curiam* opinion (R. 109):

> "This action is the same in principle as the *Zurich Insurance Company* case decided herewith. In the present litigation the trial justice granted plaintiffs' motion for summary judgment for the amount demanded in the complaint but the Appellate Division modified by reducing the judgment to amounts to conform with the theory that the Joint Resolution of Congress required payment of these coupons in foreign currency in a foreign country based upon the value of United States dollars as depreciated. The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs, etc."

The law in New York thus having been settled by the Court of Appeals, all decisions of the Appellate Division or of the lower courts of New York, from which the inference might be drawn that the Joint Resolution applies to the foreign money alternatives of multiple currency clauses may thereby be deemed overruled.[27]

The Court of Appeals opinions can now be taken as adopting Mr. Justice Merrell's dissent in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634 (1st

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[27] *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634 (1st Dept., 1935); *Anglo-Continentale Treuhand, A.G.* v. *Southern Pacific Co.*, 155 Misc. (N. Y.) 562 (1936), affirmed without opinion, 251 App. Div. 803 (1st Dept., 1937), motion for reargument or leave to appeal to Court of Appeals denied, 251 App. Div. 885 (1st Dept., 1937); *Hydropress Handels. A.G.* v. *Lackawanna Steel Co.*, New York Law Journal, May 7, 1938, page 2221 (not officially reported); also the decision of the Appellate Division and of the Trial Justice in the *Zurich* case and of the Appellate Division in the instant case. It is worthy of note that even in all of the aforesaid opinions (except in the *Zurich* case below) language appears indicating that foreigners have the right to recover foreign moneys abroad on multiple currency clauses.

Lower court decisions in New York State which now remain in harmony with the decisions of the Court of Appeals, and which may be regarded as

Dept., 1935) (herein sometimes called the *"City Bank"* case). In that case the majority held that a *domestic*[28] trustee could not recover the value of guilders upon multiple currency coupons of the issue at bar but was limited in its recovery to the face dollar amount of the coupons.

Mr. Justice Merrell vigorously dissented (see pp. 640-641 of 244 App. Div.), stating, among other things:

"* * * The resolution is carefully limited to obligations 'payable in money of the United States,' and payable in 'a particular kind of coin or currency of the United States.' There is no intention on the part of the Congress to extend the resolution to obligations payable in foreign countries in a foreign currency. The absence of any such intention is clearly shown by the preamble of the resolution, which stated as follows:

* * * * * * *

"The resolution itself is clear and unambiguous and should not be extended by interpretation or construction to include any reference to obligations other than those which are payable in money of the United States. Under well-recognized constitutional limitations the Congress had no power to extend the scope of the resolution so as to give it extraterritorial effect * * * Neither the power of the Congress to regulate the value of the money of the United States nor 'the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts,' has any application to the contract here involved, which contract provided expressly for the payment of the coupons in guilders at Amsterdam,

having validity, are: *Mondiale Handels-und Verwaltungs and another* v. *Bethlehem Iron & Steel Corporation; Nederlandsche Middenstandsbank N. V. and others* v. *Bethlehem Steel Co.; Zurich General Accident & Liability Ins. Co.* v. *Bethlehem Iron & Steel Co.* (all decided by Mr. Justice Hofstadter and all reported only in New York Law Journal, June 13, 1936, p. 3029).

The judgments in all three last-mentioned cases were paid in full with interest, and they, together with the *St. Louis Southwestern* case, constitute the only final, unappealable holdings on the question—all to the effect that the Joint Resolution does not affect the foreign money alternatives contained in the multiple currency features of the coupons sued upon.

[28] According to the majority opinion (p. 636), it was not contended that the holders of the coupons, who were subjects of England and Holland, respectively, were governed by the terms of the Joint Resolution (see p. 68, *infra*).

> Holland, in case the holder exercised its option to pre
> sent the same for payment there. In adopting thi
> resolution the Congress recognized that it could no
> make this law effective in a foreign country. Th
> Congress must have recognized that its declaration
> as to the American public policy had nothing to do
> with contracts to be performed abroad."

(b) *Anglo-Continentale Treuhand, A. G.* v. *St. Loui Southwestern Railway Co.*, 81 F. (2d) 11 (C. C. A. 2d 1936), cert. den. 298 U. S. 655 (1936), is the decision re ferred to and relied upon by the Court of Appeals in settling the law in New York to the effect that the Joint Resolution does not apply to the foreign money alternatives containe in multiple currency clauses.

In that case, Judge Learned Hand, writing for a unanimou Circuit Court of Appeals for the Second Circuit, in an actio upon coupons detached from the bonds involved in No. 38 expressly rejected the reasoning of the majority of the Ap pellate Division in the *City Bank* case (*supra*), and adopte the reasoning of Judge Lindley in *McAdoo* v. *Souther Pacific Co.* (*infra*) and the reasoning of the dissenting opin ion of Mr. Justice Merrell in the *City Bank* case, using th following language:

> "Judge Lindley in *McAdoo* v. *Southern Pac. C*
> (D. C.) 10 F. Supp. 953, took our view; the Appe
> late Division of the Supreme Court of New York b
> a majority of four to one decided otherwise. *Cit*
> *Bank Farmers' Trust Co.* v. *Bethlehem Steel Co.*, 24
> App. Div. 634, 280 N. Y. S. 494. We are not pe
> suaded by the reasoning of the majority."

Other language from this well-reasoned opinion is else where quoted in this brief.

The judgment in the *St. Louis Southwestern* case was pai in full with interest, and up to the present time this is th only case which has been litigated to the ultimate cour to which it could possibly go.

(c) As indicated, Judge Hand's excellent opinion in th *St. Louis Southwestern* case cited with approval *McAdo*

v. *Southern Pacific Co.*, 10 Fed. Supp. 953 (N. D., Cal., S. D., 1935), (reversed, solely on jurisdictional grounds, by the Circuit Court of Appeals, 9th, and remanded because the amount involved in the suit was less than $3,000, 82 F. [2d] 121 [1936]). That was a suit for a declaratory judgment by a *domestic* upon coupons similar to those at bar, issued by one of the companies in the railroad system of one of the Respondents (Southern Pacific Co.) in No. 384. Judge Lindley, in a clear and convincing opinion, held that even a domestic was entitled to recover the value of foreign moneys if payment in such foreign moneys was selected by him.

In referring to *Norman* v. *Baltimore & Ohio R. Co., supra*, Judge Lindley said (at p. 953):

> "In the Gold Clause cases, *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, * * * the court was dealing with legislation that expressly forbade contracts payable in gold coins of the United States. There, the court said: 'The Congress has enacted an express interdiction' [citations]. The question with which the court here is primarily concerned is whether that interdiction expressly or impliedly includes contracts payable in guilders of the Netherlands of francs of Switzerland."

and, in discussing the Joint Resolution, he said at page 954:

> "The unambiguous provision of the resolution then, is to declare unlawful clauses requiring payment in gold of any obligation 'payable in money of the United States,' in 'coin or currency of the United States.' The act by its own language carefully limits its force to 'obligations payable in money of the United States,' and purports to deal only with 'coin or currency of the United States.' The bar of illegality, by its own terms, is defined and limited in effect. Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries. The preamble of the resolution so indicates. If we give full force and effect to the unambiguous language employed, we are unable to point out any words that disclose any intent

to extend the prohibition further than that language clearly indicates. Consequently, the rights and liabilities of the parties in the contracts under consideration, not being within the legislation, are the same as if the resolution had never been adopted."

(d) In the face of Judge Lindley's decision in the *McAdoo* case, and of the opinion in the *St. Louis Southwestern* case, the Circuit Court of Appeals in No. 384 placed a different construction upon the Joint Resolution, apparently—we believe erroneously—basing its decision (in part at least) upon the circumstance that this railroad obligor is in reorganization. 98 F. (2d) 160, at 165.

We respectfully submit that the reasoning of Judge Hand in the *St. Louis Southwestern* case, and of the New York Court of Appeals in the *Zurich* case (No. 590), and in the case at bar (No. 591), truly and correctly construes the Joint Resolution so far as concerns its impact upon the foreign money alternatives contained in the multiple currency clauses of the coupons sued upon.

The Court of Appeals, in making the decisions below in No. 590 and in the instant case (No. 591), had before it the then most recent decision (that of Circuit Court Judge Stone in No. 384) as well as all the preceding decisions in its own and the other jurisdictions in which multiple currency clauses had come up for decision; it had itself decided the *Norman* and the *Inversiones* cases in a manner which had received affirmance and approval in this Court; it also had the decision of this Court in the *Holyoke* case. With all these decisions before it, it correctly found the opinion of Judge Hand in the *St. Louis Southwestern* case, and the opinions of Mr. Justice Hofstadter and of the dissenting justices in the Appellate Division in the instant case, to represent the proper interpretation of the Joint Resolution, so far as concerns its non-applicability to the foreign money alternatives contained in multiple currency clauses.

It is the considered view of this Court (whose construction of the Joint Resolution[29] has previously been approved by this Court) which we now urge—to the effect that the Joint Resolution does not apply to the foreign money alternatives contained in multiple currency clauses, especially when the coupons are owned by foreigners and payment of foreign currency is demanded abroad.

In the *St. Louis Southwestern* case plaintiffs expressly conceded (see pp. 35-36 of appellees' brief in the Circuit Court of Appeals; p. 3 of respondent's brief in opposition to petition for writ of certiorari) that the instruments there sued upon were acquired after the passage of the Joint Resolution, but judgment was nevertheless granted to the plaintiffs. The same express concession was made by Respondents at bar (see p. 8 of their brief in the Court of Appeals) and the fact conceded is as immaterial now to the questions at bar as it was then.

(II) Respondents are foreigners, and the Joint Resolution does not purport to affect, and cannot affect, payments in foreign moneys to be made to foreigners abroad.

We have heretofore pointed out under Point B(3), pp. 35 *et seq., supra,* that legislation is presumptively territorial only and is confined to the limits over which the law-making power has jurisdiction; and that therefore the Joint Resolution can in no way affect the coupons here sued upon, which constitute contracts performable and payable to foreigners in a foreign country in the lawful money of that country.

The decision of the Court of Appeals below did not distinguish between the rights of foreigners and domestics, but may be construed as a holding generally that the Joint Resolution did not prohibit the payment of guilders in Holland upon the coupons sued upon.

Nevertheless, in each and every of the (now overruled) decisions of the New York courts which denied full recovery (save only in the decision of the Trial Justice in the *Zurich* case, No. 590) a distinction was recognized between the rights of foreign and the rights of domestics.

[29] In respect of its impact upon gold clauses.

Even should this Court hold that the Joint Resolution applies to the foreign money alternatives in the multiple currency clause of the coupons here sued upon when in the hands of domestics (which we submit, however, that it does not), the history of the Joint Resolution itself, the opinions of various of the Judges who have passed upon the question, the expressions of Debtors having adverse interests, and the expressions of the very Petitioner at bar, show that it has always been recognized that the Joint Resolution could not affect, and was not intended to affect, the rights of foreigners to recover foreign moneys abroad.

Thus, in the *City Bank* case, the following language appears at page 636 of the majority opinion:

> "It is not contended by the appellant[30] that the holders[31] of these coupons who are subjects of England and Holland, respectively, are governed by the terms of the Joint Resolution. In fact, the affidavits show that all payments have been made to *bona fide*[32] holders in foreign countries in accordance with the terms of the agreement."

In *Anglo-Continentale Treuhand, A. G.* v. *Southern Pacific Co.*, 165 Misc. (N. Y.) 562 (1936) (aff'd without opinion 251 App. Div. 803 [1st Dept., 1937]; motion for reargument or leave to appeal denied 251 App. Div. 885 [1st Dept., 1937]), the following appears in Mr. Justice Valente's opinion below (pp. 563-564):

> "In the case of an alien holder demanding payment abroad in a foreign currency, *both the State and Federal courts are united in holding that the payment is not forbidden by the joint resolution, even though the transfer from a domestic to the alien holder occurred after the passage of that legislation.* (*Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern R. Co.*, [C. C. A.] 81 F. [2d] 11; 105 A. L. R. 636; certiorari denied, *Henwood* v. *Anglo-Continentale*

[30] The appellant in that case is the Petitioner at bar.

[31] Referring to holders other than the plaintiff in that case.

[32] "Bona fide," not in the sense conventionally applied to negotiable instruments, but in a restricted sense treated and used by Petitioners to refer to purchasers prior to June 5, 1933.

Treuhand, A. G., 298 U. S. 655; 56 S. Ct. 675; 80 L. Ed. 1381; *Nederlandsche Middenstandsbank* v. *Bethlehem Steel Co.*, N. Y. L. J. June 13, 1936, p. 3029.)"

Respondent Henwood in No. 384, in its brief to the District Court, likewise drew a distinction between the rights of foreigners and the rights of domestics. For instance, it urged as a ground for denying the claim of the Guaranty Trust Company in No. 384, that Claimant is a United States corporation, this claim is presented in behalf of American owners, and recourse made to an American court for the allowance of the claim" (Brief of Henwood to District Court, p. 23).

Discussing the *City Bank* case, that same Respondent expressly recognizes that the only question there presented was as to "the right of *an American citizen* to recover judgment for an amount in excess of the United States money value * * *" (*ibid.*, p. 30).

At page 31 of the same brief that Respondent concedes that the decision in the *City Bank* case "pointed out that where *domestic* holders of bonds and coupons were concerned, they were also 'within the spirit and intent of the Joint Resolution,' * * *."

At page 33 he distinguishes the *St. Louis Southwestern* case on the ground that

> "The case is a holding by the Second Circuit that a FOREIGN HOLDER of bonds and coupons, *no matter when acquired*, may recover judgment in American courts for the value of foreign moneys called for by the foreign money options contained in the coupons."

Furthermore, in his attempt to avoid the effect of the *St. Louis Southwestern* case, that Respondent used the following language at page 33 of its brief to the District Court:

> "There is no necessary inconsistency between the holding of the Second Circuit Court of Appeals, dealing with the rights of foreign holders of bonds to collect the interest in guilders, and the holding of the New York Appellate Division dealing with the rights of domestic holders of such bonds."

A similar statement is made in his brief to this Court in No. 384 (see p. 57 thereof).

This very Petitioner itself, discussing the rights of foreign holders in the *City Bank* case, made the following statement at page 25 of its brief to the Appellate Division:

> "We are not concerned in this case with the rights of a foreign resident holder, whether presented in a foreign court or indeed in an American court. The defendant is in fact voluntarily paying guilders to bona fide foreign holders (who were such before the Joint Resolution) and is thereby giving effect to the spirit of the guilder payment alternative, which was, of course, that Dutch holders should receive payment in Amsterdam in their own currency."

And again at page 37:

> "The guilder provisions were added solely for the convenience of foreign holders."

All this comes very close to being (if it is not actually—which we contend it is—) a recognition by Petitioner and other debtors similarly situated, that foreign holders are in any event entitled to recover the values of foreign moneys on alternative multiple currency clauses. It recognizes a distinction between foreigners and domestics, just as Petitioner itself, in its brief to the Appellate Division in the *City Bank* case, recognized a distinction between foreigners and domestics, and just as the Appellate Division recognized the same distinction, even though denying recovery to the domestic there involved.

All concerned have thus recognized, and there should be recognized, the fact that the Joint Resolution does not affect and was not intended to affect payments on the foreign money alternatives in foreign currency to foreigners abroad.

Respondents are all foreigners. Should any holding be made by this Court to the effect that the Joint Resolution impairs the guilder clause of the coupons sued upon in the hands of domestics, this Court should nevertheless expressly recognize the claims and rights of these foreign holders.

Our conclusions in this regard are strengthened by the fact that there was a simultaneous, separate offering of these

bonds in Holland, at the same time when these bonds were offered in America and England; the price for public subscription in the United States was 91½ and accrued interest (R. 78); the price in Holland was 90¾ (R. 82); and that a separate circular in the Dutch language (the Dutch text of which was omitted in printing but the English translation of which appears at R. 81 *et seq.*) was issued to prospective purchasers in Holland.

Without waiving our contention that the Joint Resolution does not affect and never was intended to affect multiple currency clauses in any event, we point out the significant fact that, even as applied to "gold clauses" which the Joint Resolution did intend to affect, it was the "discrimination between citizens" which was the evil intended to be remedied.[33]

Congressly clearly recognized its legal inability to affect the rights of aliens abroad, either *vis-a-vis* other aliens or *vis-a-vis* citizens of the United States, and it was undoubtedly for this reason that Judge Hand, in the *Southwestern* case, states (at p. 12) that if the Resolution had meant to prescribe otherwise, it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity.

That foreigners (and even domestics resident abroad) were not *intended* to be affected even by the striking of the "gold clause" by the Joint Resolution (which was the only thing which the Joint Resolution intended to effect) is further evidenced by the Act of March 26, 1934, 48 Stat. 466, as amended, August 14, 1937, 50 Stat. 641, 5 U. S. C., Sec. 118-c, appropriating $7,438,000 to meet losses sustained by consular officers and employees in foreign countries due to appreciation of foreign currencies in their relation to the American dollar; and by the Philippine Act approved June 19, 1934, 48 Stat. 1115, appropriating $23,862,750.78 in favor of the Treasury of the Philippine Islands.

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[33] See pages 46-47 of Petitioner's (Respondent below) brief to the Court of Appeals in the *Zurich* case, quoting Mr. Steagall, Chairman of the Committee in charge of the Resolution in the House of Representatives, Cong. Rec., 73rd Cong., 1st Session, at page 4586.

> "being an amount equal to the increase in value (resulting from the reduction of the weight of the gold dollar) of the gold equivalent at the opening of business on January 31, 1934, of the balances maintained at that time in banks in the continental United States by the Government of the Philippine Islands for its gold standard fund and its Treasury certificate fund less the interest received by it on such balances."

Congress thus specifically had in mind the fact that foreign currencies might appreciate[34] in value, and its failure to legislate in respect of such foreign currencies, in the light of the Joint Resolution and the legislation above mentioned, shows that it must have specifically intended to exclude payments in foreign currencies to foreign residents (or even to domestics) from the operation of the Joint Resolution.

If, for instance, let us say, Mexico had passed a "Joint Resolution," it is inconceivable that any weight would be attached to the argument that American citizens could not recover dollars on a multiple currency Mexican coupon, simply because a specified amount of Mexican currency might also be referred to on the face of the coupon.

When the Mexican Government recently seized the property of American citizens in Mexico, the United States Government made diplomatic representations in remonstrance thereagainst.

The same international policy which insists upon foreign governments and aliens observing and preserving the rights of American citizens abroad should be exercised to observe and preserve the rights, arising abroad, of aliens, resident abroad, against American citizens, even though the enforcement of such rights be sought in the courts of the United States.

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[34] In fact, Section 1 of the Act authorizing the President to devalue the dollar, Title III of the Act of May 12, 1933, 48 Stat. 51, as amended, 31 U. S. C., Sec. 821(2), specifically refers to the "depreciation" of foreign currency, and nowhere is it indicated that any danger is apprehended from "appreciation" of such currency.

Petitioner itself states (e. g., at pp. 39, 40, 42, 43 of its brief) that it was the "depreciation"—(not the "appreciation")—of foreign currencies which Congress intended to accomplish. It is somewhat anomalous, therefore, to say the least, for it to take the position that, because the guilder is worth more now than on the day the Joint Resolution was passed, payment in guilders is in violation either of the spirit or of the intent of the Joint Resolution.

Equally, the foreign holder of coupons of an American corporation, payable in Holland in guilders, should be entitled to recover from the debtor in the courts of America to "the full extent of the maker's promise to pay." Cf. *Security-First Nat. Bank of Los Angeles et al.* v. *Rindge Land & Navigation Co. et al., supra.*

In an anticipatory attempt to overcome the force of the foregoing arguments, Petitioner devotes considerable space in its brief (pp. 15, 30, 31) to a discussion of *The Titanic*, 233 U. S. 718 (1914), concluding, upon its construction of that case, that this Court may decline to enforce the guilder clause "when to do so would conflict with domestic public policy." The short answers to Petitioner's argument are: (1) There is no domestic public policy inhibiting the payment of guilders to foreigners abroad; and (2) *The Titanic* case arose under an admiralty statute, which specifically provided for limitation of liability if suit therefor were brought in American courts;[35] and (3) *The Titanic* case is not applicable, or even analogous, because at bar there is no analogous American statute specifically (or even impliedly) prohibiting the payment demanded by Respondents. As its premise, Petitioner assumes its fallacious conclusion (viz., that payment to foreigners abroad in guilders is inhibited), and, reasoning therefrom, naturally arrives at its erroneous conclusion that Respondents cannot recover.

It completely ignores the well-settled rule of statutory construction set forth in *Sutherland, Statutory Construction, supra*, Sec. 546, p. 1019, as follows:

> "All statutes for interference with legitimate industries or the ordinary uses of property, or for its removal or destruction for being a nuisance or contributory to public evil, are treated with a conservative regard for the liberty of the citizen[36] in his laudable business, and in the innocent enjoyment of his possessions, and generally the rights of property. Such

[35] So admitted by Petitioner in its brief in its footnote on page 30.

[36] (Footnote ours.) Aliens are entitled to the same protection (see p. 74, *infra*).

> interferences are cautiously justified on principles of the common law, and only in cases of imperative necessity (citing *Mayor etc. of New York* v. *Lord*, 18 Wend. 128; *Respublica* v. *Sparhawk*, 1 Dall. 357; *Russell* v. *Mayor, etc.*, 2 Denio 461, 474) or under valid statutes plainly expressing the intent" (citing many cases).

There is no "imperative necessity," nor are there "valid statutes plainly expressing the intent," to construe the Joint Resolution in the manner contended for by Petitioner—indeed, quite the contrary is the case.

In light of the foregoing, Judge Learned Hand's compelling statement in the *St. Louis Southwestern* case (at p. 12) that, in the absence of the clearest immanent purpose a construction of the Joint Resolution favoring the position taken by Respondents at bar would be adopted, becomes particularly significant.

Any refusal to permit such recovery would constitute a confiscation by government decree of the rights of these foreign holders for the benefit of particular domestic debtors (see Point B(8), *supra*).

The mere fact that Respondents are aliens does not deprive them of their constitutional rights. *Wong Wing* v. *United States*, 163 U. S. 228 (1896); *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931).

(12) Summary Statement showing non-applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses.

This case, in its true aspect, does not involve the construction of the Joint Resolution at all, because the Resolution does not apply to the foreign currency alternatives contained in multiple currency clauses. The coupons sued upon are not within the legislation.

The Joint Resolution not being applicable, the rights and liabilities of the parties at bar are the same as if it had never been adopted. The question, therefore, resolves itself into a simple problem in contracts.

"When a contract involves a promise to do one thing or another at the option of either party the place of performance is undetermined until the option is exercised, and it then becomes the place of performing the promise which is chosen by the party having the option." *Restatement, Conflict of Laws,* Sec. 356(1).

The number of guilders is specifically set out in the bonds and coupons. Bondholders who elect to receive the same could get no lesser or larger number of guilders than set forth therein despite the fluctuations of the various currencies. If a holder of Lackawanna bonds chose francs, for instance, he could get no more units of that currency because francs had depreciated. Petitioner's reasoning would compel it to pay $25 for each coupon in America, even though a French citizen, for reasons of his own, might have elected to take francs in Paris, worth less than 25% of the dollar amount. Such a result shows the fallacy of any such argument.

Petitioner endeavors to create an ambiguity by torturing the coupons into reading as though they are instruments payable only or primarily in "gold dollars," whereas in fact, by the exercise of the choice of guilders in Holland, they become payable *solely* in a fixed number of such guilders, not measured by nor in relation to (a) "gold" or (b) "a particular kind of coin or currency of the United States" or (c) "an amount in money of the United States measured thereby."

It is an obvious fact that these bonds and coupons are drawn by the issuing corporation and that the holders thereof had no part in the composition thereof.

We respectfully submit that there is no ambiguity; nevertheless, if any exists, the instruments must be construed against Petitioner, whose words they are. *Williston on Contracts,* Sec. 621, (1938) and cases cited in note; *Restatement, Contracts,* Sec. 236(d); *ibid.,* Sec. 325(2); *Rothschild* v. *Rio Grande Western R. Co.,* 84 Hun 103, 109 (1st Dept., 1895), aff'd. 164 N. Y. 594 (1900).

Neither the *Norman* case, nor the *Inversiones* case, nor the *Holyoke* case impair the conclusions reached by us. In fact, those decisions actually support our position. Only the "gold" and "gold coin" *terms* attached to the dollar amounts were stricken in those cases, the resulting and remaining promises remaining unaffected. The same action at bar results in a valid and binding obligation by Petitioner to pay the guilders here sued for, and compels the affirmance of the judgment appealed from.

Concluding this point, we adopt for our own summary the following masterly statement of Professor Nussbaum (84 U. of Pa. L. R., at pp. 578-579) in respect of the inapplicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses:

> "To sum up: The multiple currency situation under both legal and legislative views is wholly different from the gold clause situation. It cannot be presumed therefore, that Congress, in impairing the gold clauses, intended to reach the multiple currency clauses. Hence, an American holder of a multiple currency bond does not evade the Joint Resolution when choosing payment in foreign currency under the terms of the bond. Even less does he directly violate the Resolution since its text is unambiguously confined to gold obligations. No true interpretation of the Joint Resolution can ever yield a different result. It has been said that the Joint Resolution is poorly drafted. However, compared with the numerous foreign statutes abrogating or encroaching upon gold clauses, the American law, which in a remarkable way utilizes foreign doctrines, is a model of carefulness. Perfect clarity is not missing with regard at least to multiple currency clauses. But still if there were an ambiguity in the text the Resolution would not be applicable to the multiple currency situation for the very material reasons expounded above."

POINT C.

(1) The place and medium of payment of the coupons were at the holder's option, and the obligor must discharge its indebtedness as the holder elects.

(2) An obligation in terms of the currency of a country takes the risk of currency fluctuations, and whether debtor or creditor profits, the law takes no account of it.

(3) As a result of Respondents' election, the law of the place of performance (Holland) governs, and under that law Respondents' choice of the medium of payment is legal.

(4) Respondents are entitled to recover in full, as held by the Court of Appeals, whether American or Dutch law be applied.

(1) The rights and liabilities of the parties in the case at bar, not being within the legislation, are the same as if the Joint Resolution had never been enacted. *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co., supra; McAdoo* v. *Southern Pacific Co., supra,* at p. 954.

When an alternative contract has ceased to be alternative by reason of an election by the party having the choice, a breach as to the one remaining alternative occurs in the same way as if the contract had originally provided for only that performance. *Restatement, Contracts,* Sec. 325(2).

The fact that one alternative is or becomes impossible of performance does not excuse the promisor from performing that which remains possible, *Williston on Contracts,* Sec. 1961 (1938); and if, before the breach, all the alternatives but one are eliminated by impossibility, illegality or otherwise, the contract ceases to be an alternative one and damages for a breach are measured according to the single performance now required. *Restatement, Contracts,* Sec. 344, Comment (b). See, also: *Restatement, Conflict of Laws,* Sec. 364, and Sec. 356(1).

Furthermore, the rule of conflict of laws is that all matter connected with the performance of a contract are regulate by the law prevailing at the place of performance. *Scudde* v. *Union Natl. Bank*,[37] 91 U. S. 406 (1875); *Union Nationa Bank* v. *Chapman*,[37] 169 N. Y. 538 (1902), at 543; *Lass* v *United Steel Works Corp.*, 166 Misc. (N. Y.) 465 (1938), a 470; *Restatement, Conflict of Laws*, Sec. 360; *Pan-Americ Securities Corporation* v. *Krupp, supra; Anglo-Continental Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.*, *supra*. Accord: *Richard* v. *American Union Bank*, 241 N. Y 163 (1925), at p. 167; *Matter of James*, 248 N. Y. (1928), a p. 6; *Tillman* v. *Russo Asiatic Bank*, 51 F. (2d) 1023, 102 (C. C. A., 2nd, 1931); *cf.: Seeman* v. *Philadelphia Warehou Co.*, 274 U. S. 403 (1927).

(2) An obligation in terms of the currency of a coun takes the risks of currency fluctuations and whether credito or debtor profits by the change, the law takes no accou of it. *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, 51 (1926); *Hicks* v. *Guinness*, 269 U. S. 71, 80 (1925).

Even if otherwise applicable to the foreign money alte natives of the multiple currency clauses (which we deny see Point A, *supra*), the Joint Resolution cannot extend t contracts to be performed or to instruments payable in Ho land (see cases cited on page 35, *supra*).

There is no contention made, nor can there be, that Ho land either applies the Joint Resolution or has the Dutc equivalent of a Joint Resolution.[38]

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[37] Cases involving negotiable instruments payable at a place other than t place where made.

[38] In fact, not only is Holland without a "Joint Resolution" but it has bee specifically held by the Supreme Court of The Netherlands High Council a decision rendered March 13, 1936 (official citation not available), reversin the judgment of the Appeal Court of The Hague, that bonds of the Roy Dutch Company were not affected by the Joint Resolution. *Vereeniging voo den Effectenhandel* (plaintiff-appellant) v. *Nederlandsche Maatschappy t Exploitatie van Petroleumbronnen in Nederlandsche-Indie* (defendant-respon ent). Said decision was based upon an opinion of the Attorney General t the Supreme Court of The Netherlands on the cases concerning the loa of the Royal Dutch and the Batavsche.

Specifically, also, attention is called to the case of *The Limited Liabili Company N. V. Anglo Continental Trust Maatschappij, of Rotterdam*, plai tiffs v. (*1*) *The Bethlehem Steel Company, of South Bethlehem* (Pen U. S.), and (*2*) *The Bethlehem Steel Corporation, of Newark* (*N. J., U. S.* defendants, decided by the District Court of Rotterdam, 2nd Divisio

An analogous situation was recently considered in England. In that case, Canada, in 1937, having abrogated gold clause obligations (and at bar we are not concerned with the "gold clause" of the instruments—only with the foreign currency alternative of the multiple currency feature), a foreign holder, having exercised its option to receive interest payments in London, sued in England for principal and interest measured by the gold clause of the bond which provided for payment in Canadian gold dollars in Canada or in sterling in London. The Court of Appeal held that since the contract was performable in England—the holder having elected performance in England—the English law governed and required full payment according to the gold clause. *British & French Trust Corporation, Ltd.*, v. *New Brunswick Railway Co., Ltd.*, 54 The T. L. R. 172 (1937) (Court of Appeal) (affirmed by the House of Lords, December 13, 1938, 55 The Times L. R. 260).[39]

At bar, the payment chosen by Respondents was lawful when the instruments were issued; it is lawful to-day in Holland, the place of performance, when and where performance is due. It is lawful in America to-day.

(3) Articles 1308-1313 of the Dutch Civil Code provide that in the case of alternative obligations, where the choice has been left to the creditor, if one of the two things has perished or can no longer be delivered, the creditor is entitled to the other (R. 51).

January 15, 1936 (official citation not available), based upon 7 coupons of the very issue now before this Court, wherein the said District Court of Rotterdam held that the Joint Resolution did not apply to the multiple currency features, and "condemned" this Petitioner to pay at Amsterdam the sum of 42.25 guilders in respect of each coupon. While said judgment was a "default" judgment, and the defendants were not represented in court, nevertheless it reviews and gives consideration to the essential facts, and expresses the Dutch law upon the subject.

[39] For other English decisions on currency questions to the effect that the law of the place of performance will govern, see: *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, 50 The T. L. R. 147 (1934); *Rex* v. *International Trustee for the Protection of Bondholders, A. G.*, 53 The

The choice was left to the creditors at bar and they exercised their choice to take guilders in Holland. Such payment was therefore lawful there.

(4) It is thus apparent that, whether the coupons are construed according to New York law, or whether Conflict doctrines be applied and the instruments are construed according to Dutch law, the election by Respondents to demand and receive guilders in Holland is valid and binding, and Petitioner must pay the coupons there upon Respondents' demand, or respond in damages in lawful money in a suit in this country for the value of the guilders refused, as of the appropriate date. Respondents are accordingly entitled to recover the full amount sued for.

As well stated by Judge Hand in his opinion (p. 12) in the *St. Louis Southwestern* case, *supra:*

> "* * * by the law of most civilized countries the legality of the performance of a contract depends upon the law of the place of performance, and a contract is enforceable, if lawful by the law of the place of making when made, and if the performance is lawful by the law of the place of performance when due. Certainly that is true of our own law. Restatement of Conflict of Laws, §360. If the resolution had meant to prescribe otherwise, **it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity;** we are justified in insisting that a statute must make such an intent plain beyond any doubt."

The Joint Resolution certainly does not make any such intent "plain beyond any doubt". To the contrary, payment of foreign moneys abroad is not even mentioned therein, much less inhibited; and its clear wording excludes any as-

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T. L. R. 507 (1937). Cf. *Feist v. Societe Intercommunale Belge d'Electricite*, 50 The T. L. R. 143 (1934). Cf., also, *Case of Serbian Loans*, Perm. Court of Int. Just., Series A, No. 20 (1929); *Case of the Brazilian Loans*, id., No. 21 (1929). See, also, *Dicey, Conflict of Laws* (2d Ed.), 563.

For an interesting decision on the non-applicability of the Canadian "Joint Resolution," see the case of the Amsterdam Stock Exchange against French National Mail, decided by Tribunal Civil de la Seine, 1re Ch., November 16, 1938 (—no official citation available—reported in Gazette du Palais Journal du Soir Judiciaire Quotidien, November 26, 1938, p. 3), holding Holland to be the place of performance (the prospectus and offering circular mentioned Holland) and ordering a French corporation to pay the value of Dutch guilders.

sumption that such payment was intended to be interdicted thereby.

Respondents, choosing guilders in Holland, are entitled here to recover the full value thereof, whether American or Dutch law be applied.

POINT D.

The functional approach to Petitioner's interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

Respondents of course agree, without argument, that if a holder of a multiple currency coupon presents the same in the United States and demands gold dollars, Petitioner's obligation in respect of the coupon would be fully discharged by the payment of an equal number of present lawful American dollars. This would be strictly according to the tenor of the instrument itself, the demand having been made in America, the currency selected being coin or currency of the United States, and the Joint Resolution simply striking the "gold coin" term from the instrument, and permitting the payment of the same number of present lawful dollars as is exactly specified in the instrument itself (say, $25 in currency of the United States in the case of a typical coupon).

Let us, however, apply the pragmatic test to Petitioner's interpretation of what happens or should happen upon presentation of the same coupon in Amsterdam, Holland, and demand for the specific number of foreign monetary units expressed in the instrument (in the typical case, 62.25 guilders):

(1) May the debtor tender, in Amsterdam, Holland, $25 in currency of the United States for each coupon of 62.25 guilders and thereby fully discharge its obligations on the coupon?

(2) May the debtor tender, in Amsterdam, Holland, for each coupon that number of guilders (less than 62.25) which $25 in currency of the United States would purchase in Holland?

(3) May the debtor refuse to make any payment at all in Holland and insist that it has the right to pay the coupon at its office or agency *in the United States*, instead of in Holland, the place of payment selected by the holder (in whom is vested the choice of currencies and the choice of the place of payment)?

(4) If the choice of the place of payment thus passes to the debtor, may the debtor pay *in the United States* $25 in currency of the United States, and thereby discharge the obligation created by the demand in Holland for the payment of 62.25 guilders in Holland?

(5) If the choice of the place of payment thus passes to the debtor, may the debtor pay in the United States that number of Dutch guilders (less than 62.25) which $25 in currency of the United States would purchase, and thus discharge the obligation to pay 62.25 guilders in Holland created by the holder's demand in Holland?

(6) If the choice of the place of payment thus passes to the debtor, is the foreign holder, for whom the foreign places and currencies of payment were more particularly provided, forced to make presentation and demand in America?

(7) Must such last-mentioned presentation and demand be for payment in dollars?

(8) If the reasoning adopted by Petitioner is sound, is the entire coupon, as well as each and every provision thereof, and the obligations thereof, void, and, if so, is the debtor relieved from any payment thereon whatever?

In asserting (in effect) that it is entitled to tender in the United States $25 in currency of the United States for each coupon of 62.25 guilders (although payment thereof was demanded in Holland in 62.25 guilders in Dutch currency) (i. e., in adopting Nos. 3 and 4 above) Petitioner has failed to consider or answer the other very material questions propounded above.

And yet if the burden of Petitioner's contentions is to prevail, all the above questions must be answered in the affirmative, though confusion worse confounded would result. To state the questions and to assume the affirmative answers made necessary by Petitioner's interpretation of the Joint Resolution, is to state a complete refutation to Petitioner's arguments at bar, and to disclose their fallacy.

Congress could never possibly have anticipated or intended any such results. Certainly there is no word or syllable in the Joint Resolution that would lead any legislator, or any court construing the legislation, to believe that any such result was anticipated or intended. The debates in Congress contain no word or syllable that would indicate that any such result was or could have been anticipated or intended. The Joint Resolution itself expressly limits its impact to (a) "gold" or (b) "a particular kind of coin or currency of the United States" or (c) "an amount in money of the United States measured thereby." It does not affect and was not intended to affect any payments of foreign monetary units, either in the United States or abroad. The only tenable and reasonable construction of the Joint Resolution is that contended for by Respondents.

The functional analysis above—an analysis necessary and vital to the correct interpretation of the Joint Resolution—leads unmistakably and irresistibly to the conclusion that the Joint Resolution does not affect the foreign money alternatives contained in the multiple currency coupons sued upon.

POINT E.

Whatever may be the decision of this Court as to the general application of the Joint Resolution to foreign money alternatives contained in multiple currency clauses, the judgment appealed from should be affirmed as to Respondents Anglo and Mondiale.

(1) Respondents may urge all grounds for sustaining the judgment appealed from, whether or not raised by the petition.

While Petitioner may urge upon this Court only the questions presented in its petition. *Guaranty Trust Company of New York* v. *United States*, 304 U. S. 126 (1938). Respondents may nevertheless urge all other grounds to sustain the judgment appealed from. *Langnes, etc.* v. *Green*, 282 U. S. 531, 538-539 (1931); *Story Parchment Co.* v. *Paterson Parchment Paper Co. et al.*, 282 U. S. 555, 560 (1931). Accordingly, we urge that, irrespective of any decisions in other cases on the multiple currency clauses, the judgment appealed from should be affirmed as to Respondents Anglo and Mondiale because the issues of law and fact herein involved have heretofore been adjudicated between them and Petitioner in a prior action.

(2) The Trial Justice properly took judicial notice of the "First Action."

The Trial Justice took judicial notice of the "First Action", which involved questions of law and fact similar to those involved herein. See description of "First Action," pp. 6 *et seq., supra;* see decision of Trial Justice in the instant case (R. 86). In doing so, he applied accepted principles of judicial notice, viz., that the Court takes judicial notice of its own records in the same and in related cases. *Slater* v. *Slater*, 208 App. Div. 567, 571 (1st Dept., 1924), aff'd without opinion 240 N. Y. 557 (1925); *Matter of Goldowitz*, 153 Misc. (N. Y.) 182, 184 (Surr Ct., Kings Co., 1934); *Matter of Surpless*, 143 Misc. (N. Y.) 48, 50 (Surr. Ct.,

Kings Co., 1932) (citing many cases); *Matter of Clarke,* 145 Misc. (N. Y.) 660, 665 (Surr. Ct., Orange Co., 1932) (citing many cases); *Devine* v. *Melton,* 170 App. Div. 280, 282 (1st Dept., 1915); *Matter of Ordway,* 196 N. Y. 95, 97 (1909); *Shaw* v. *Shaw,* 155 App. Div. 252, 253 (2d Dept., 1913); *Silverstein* v. *Brown,* 153 App. Div. 677, 680 (1st Dept., 1912).

The courts of New York have even gone so far as to take judicial notice in one proceeding of the fact that one of the parties thereto was acting as a reorganization committee in entirely separate suits affecting other properties, pending in the same Court, *Clinton Trust Co.* v. *142-144 Joralemon Street Corp.,* 237 App. Div. 789, 792 (2nd Dept., 1933); and "of the large number of rate cases heretofore considered by the courts where experience has demonstrated the magnitude of the labors involved and the length of time required to analyze intelligently and accurately the technical evidence presented." *City of New York* v. *Interborough Rapid Transit Co.,* 134 Misc. (N. Y.) 827, 832 (Supreme Ct., N. Y. Co., 1929).

See, further: *Matter of Transfer Penalty Cases,* 46 Misc. (N. Y.) 579, 581 (App. Term, Sup. Ct., 1905).

Cf., for similar doctrines in other States, *Danforth* v. *Egan,* 23 S. D. 43 (1909), where the Supreme Court judicially noticed its own record in another proceeding disbarring the appellant as an attorney. *Pickens* v. *Coal River Boom & Timber Co.,* 66 W. Va. 10 (1909).

Furthermore it is held in New York that if judicial notice is taken, the complaint will be deemed expanded to the extent of the matter judicially noticed. *Walsh* v. *Trustees of New York and Brooklyn Bridge,* 96 N. Y. 427, 438 (1884); *City of Buffalo* v. *New York Central R.R. Co.,* 125 Misc. (N. Y.) 801, 804 (Sup. Ct., Erie Co., 1925); *First National Bank of Genoa* v. *American Surety Co.,* 239 App. Div. 282, 284 (4th Dept., 1933).

Thus, there being an identity of trial justices, of subject matter, of plaintiffs (so far as concerns Anglo and Mondiale), of defendant, of courts and of issues of fact and law involved—all of which was recognized by the Trial Justice—

the complaint at bar is deemed expanded to the extent of judicially noticing all of the records in the "First Action."

The complaint thus having been expanded, the records in the "First Action" were before the Court of Appeals as well as before the courts below. *Matter of Ordway, supra.*

Under the rule established by this Court itself, the records in the "First Action" and the legal conclusions reached by the trial court in that action are therefore now before this Court. Thus, in the leading case of *Hanley* v. *Donoghue*, 116 U. S. 1 (1885), it was said (at p. 6):

> "But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here."

See also: *Renaud* v. *Abbott*, 116 U. S. 277, 285 (1886); *Chicago & Alton R.R.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 623 (1887); *Adam* v. *Saenger*, 303 U. S. 59, 63 (1938); *Cyclopedia of Federal Procedure*, Vol. 6, p. 610. Cf. *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217 (1902).

(3) The judgment in the "First Action" is *res adjudicata* between Petitioner, and Respondents Anglo and Mondiale.

The doctrine of estoppel by judgment is set forth in *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620 (1933), where the Court said at page 623:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353; *Southern*

Pacific R. Co. v. *United States*, 168 U. S. 1, 48; *United States* v. *Moser*, 266 U. S. 236, 241. Since the claim in the first suit concerned taxes for 1918 and 1919 and the demands in the present actions embraced taxes for 1920-1925, the case at bar falls within the second class."

The action at bar falls within the second class of cases referred to in the opinion in the *Tait* case. Therefore the judgment in the "First Action" is *res adjudicata* in so far as concerns Respondents Anglo and Mondiale and Petitioner and its privies on all questions presented herein affecting them, and as to those questions Petitioner is estopped from asserting the defenses and claims which it seeks to assert here. The estoppel applies to questions both of law and of fact determined in the "First Action," or which could have been urged or determined therein—in other words, the estoppel runs against Petitioner on every issue that was or might have been raised or litigated in the "First Action."

In *Beloit* v. *Morgan*, 7 Wall. 619 (1868), it was held that a judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on a question of the validity of the issue in a suit brought by the same creditor against the same town, on another part of the same issue; the parties being identical, and all objections taken by the town in the second suit having been available to it in the former one.

In *Fitch* v. *Stanton Tp.*, 190 Fed. 310 (C. C. A., 8th, 1911), it was held at page 315:

> "The identity of such questions being established, the fact that the coupons for interest here are for interest accruing later upon the same bonds, for which the coupons in the former suit were given, in no manner affects the estoppel arising from the judgment in that suit." (Citing, among others, *Southern Pacific Railway Co.* v. *United States*, 168 U. S. 1, 48 [1897]).

Even more in point is *Hickman* v. *Town of Fletcher*, 195 Fed. 907 (C. C. A., 8th, 1912). That was an action on *coupons* taken from municipal bonds. Defendant pleaded as a defense that the bonds were void because the ordinance under which they were issued was not published as required by the statutes of the State. The same parties had been before the Court in two previous actions. The first action was upon the *coupons* from $69,000 of the bonds for which the plaintiff had recovered judgment and which judgment was affirmed in *Town of Fletcher* v. *Hickman*, 136 Fed. 568 (1905). The second action was upon the first-mentioned judgment and upon interest *coupons* on the same bonds which had matured *since the commencement of the first action and also upon the coupons from three other bonds of the same series which the plaintiff had subsequently purchased* and for which the plaintiff had received judgment which was affirmed in *Town of Fletcher* v. *Hickman*, 165 Fed. 403 (1908). The action in 195 Fed. 907 was upon the judgment in the second suit and also upon the bonds from which the coupons were taken in that suit, and also upon coupons maturing upon said bonds since the commencement of the second action. The Court held that the judgments in the former actions constituted *res adjudicata*, saying at page 909:

> "The defendant seeks to avoid the effect of these prior adjudications upon the ground that the demands sued upon in this action are other and different demands or causes of action than those upon which the prior suits were brought. It may be conceded that the causes of action are different, for each bond and each coupon is a separate cause of action. The identity of the demands or causes of actions in the two suits is, however, not alone the test by which the conclusiveness of an estoppel by judgment is determined, but it is the identity of the questions in issue and actually determined in the prior action, with those involved in the action in which the prior judgment is pleaded as an estoppel. This identical question was determined by this court in the recent case of *Fitch* v. *Stanton Township et al.*, (C. C. A.) 190 Fed. 310. * * * To avoid the effect of such prior adjudication, the complainant in that suit, as the defendant does

here, contended that the coupons upon which the suit was brought were other and different demands or causes of action than those involved in the prior suit, to which the plea of estoppel would not apply. * * * *"

"The general principle deducible from these and other cases is that a question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense cannot be disputed in a subsequent suit between the same parties or their privies. And, even if the second suit is upon a different cause of action, the right, question, or fact so determined must, as between the parties or their privies, be taken as conclusively established so long as the judgment remains unmodified. This rule, said Mr. Justice Harlan, in Southern Pacific R. R. Co. v. United States, above, 168 U. S. at page 49, 18 Sup. Ct. at page 27, 42 L. Ed. 355, 'is demanded for the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.' The contention of the defendant cannot be sustained."

See, also: *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1 (1897); *United States* v. *Moser*, 266 U. S. 236 (1924); *Lumber Co.* v. *Buchtel*, 101 U. S. 638 (1879); *Werlein* v. *New Orleans*, 177 U. S. 390 (1900); *Spencer* v. *Watkins*, 169 Fed. 379 (1900); *In re Cherokee Public Service Co.*, 94 Fed. (2d) 536 (C. C. A., 8th, 1938); *The Williamsburgh Savings Bank* v. *Town of Solon*, 136 N. Y. 465 (1893); *Tuska* v. *O'Brien*, 68 N. Y. 446 (1877); *In re Baker's Estate*, 249 App. Div. (N. Y.) 265 (4th Dept., 1936); *Pray* v. *Hegeman*, 98 N. Y. 351 (1885); *Donahue* v. *N. Y. Life Ins. Co.*, 259 N. Y. 98 (1932); *Credito Italiano* v. *Emanuel F. Rosenbaum*, 271 N. Y. 583 (1936); *State* v. *Patton*, 271 Mo. 554 (1917); *B. Roth Tool Co.* v. *Champ Spring Co.*, 146 Mo. App. 1 (1909).

This Court said in *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290 (1906)—where it was asserted that an answer filed in an earlier case by the Attorney General of South

Carolina failed to traverse certain facts, and that the decree was based upon such assumption——

> "But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree" (citing cases).

There is not a single issue in the case at bar that was not or could not have been raised by Petitioner in the "First Action". See: *Mitchell* v. *First National Bank of Chicago*, 180 U. S. 471 (1901); *Cromwell* v. *County of Sac*, 94 U. S. 351 (1876); *Souffront* v. *La Compagnie des Sucreries*, 217 U. S. 475 (1910).

Inasmuch as the issues of law and fact in the "First Action" were the same as those at bar, whatever the decision of this Court may be as to the applicability of the Joint Resolution to the foreign money alternatives contained in multiple currency clauses generally, the judgment appealed from should be affirmed as to Respondents Mondiale and Anglo on the principle of *res adjudicata*.

(4) Irrespective of any decision by this Court as to the general applicability of the Joint Resolution to the foreign money alternatives in the coupons, the judgment below should be affirmed as to Respondents Anglo and Mondiale. A supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation in whole or in part of the doctrine of *res adjudicata*.

Even should this Court decide that the Joint Resolution applies to the foreign money alternatives in multiple currency coupons, the judgment below should nevertheless be affirmed so far as concerns Respondents Mondiale and Anglo. The law and the facts having once been construed in favor of those Respondents, that construction cannot be changed in any subsequent disputes between the same parties or their privies on the same or similar issues.

Thus, in *United States* v. *Moser*, 266 U. S. 236 (1924), a naval officer sued for judgment in the Court of Claims for an instalment of pay. The facts are stated by Mr. Justice Sutherland at page 240 of the opinion, as follows:

> "* * * Three previous suits for installments of salary—the right of recovery in each depending upon this same basic question—were decided by the Court of Claims in his favor. In each, the contention of the Government was the same as it is here, viz.: that service as a cadet during the civil war was not service within the meaning of the statute. Between the first and second of these suits, in another suit brought by a different claimant, the court construed the statute otherwise and denied that claimant a right of recovery, *Jasper* v. *United States*, 43 Ct. Clms. 368; the change of opinion being made to rest upon a later act, then for the first time called to the court's attention, which, in terms, excluded the period of service as a cadet, but with a proviso that it should not apply to an officer who had received an advance of grade at or since the date of his retirement. C. 3590, 34 Stat. 553, 554.
>
> In the second and third *Moser Cases*, however, the Court of Claims declined to follow the *Jasper Case*, holding that, by reason of its decision in the first *Moser Case*, the question was *res judicata*. The present suit was decided in Moser's favor upon the same ground; and, in addition, the court reverted to the position taken in the first *Moser Case*, abandoning, as unsound, its view as expressed in the *Jasper Case*, upon the ground that the right of the officer was saved by the proviso."

The opinion further states (p. 241):

> "We find it unnecessary to consider the latter ruling, since we are of opinion that the court was clearly right in its application of the doctrine of *res judicata*.
>
> The general principles are well settled, and need not be discussed. The scope of their application depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits constitutes an absolute bar to the subsequent action. In

the latter case the inquiry is whether the point or question presented for determination in the subsequent action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-353. The rule is succinctly stated in *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48:

'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'

And in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396, this Court, speaking through Mr. Justice White, said:

'The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.' And see *Myers* v. *International Trust Co.*, 263 U. S. 64.

The suits here are upon different demands; and the point at issue is to be determined by applying the second branch of the rule. The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged in favor of the claimant in the three preceding suits, viz.: whether he occupied the status of an officer who had served during the civil war.

The contention of the Government seems to be that the doctrine of *res judicta* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same

in both cases. *But a fact; question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.* That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. See *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273, 291; *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 358; *Scotland County* v. *Hill*, 112 U. S. 183, 187; *Southern Minnesota Ry. Ext. Co.* v. *St. Paul & S. C. R. Co.*, 55 Fed. 690, 695, 696; *Pittsford* v. *Chittenden*, 58 Vt. 49, 57; *Bigelow on Estoppel*, 6th ed., p. 112. A determination in respect of the status of an individual upon which his right to recover depends is as conclusive as a decision upon any other matter. *Clemens* v. *Clemens*, 37 N. Y. 59, 72; *Pittsford* v. *Chittenden*, *supra*."

These conclusions are supported by the following language in *Tait* v. *Western Maryland Railway Co.*, *supra*, at pp. 625-626:

"* * *. The petitioner suggests, however, that significant facts were stipulated in the present case which were not made to appear in the former proceeding.[10] He shows that in the earlier case the Commissioner inadvertently stipulated that the first company 'may be taken as identical' with the second, whereas in the present suit the exact devolution of title from the first to the second through the foreclosure and reorganization is definitely exhibited by the stipulation of the parties. From this he concludes that the Circuit Court of Appeals might well have reached a different result on the merits, if the former case had been more fully and accurately presented. But the Circuit Court of Appeals has found that all the facts stipulated in the present cause were before it in the former one, and we accept this finding. It holds also that the former decision was based on a view of the law quite as pertinent to the bonds sold by the first company as to those marketed by the second. The petitioner may not escape the effect of the earlier

[10] Our footnote: Involving deductions for former years, and, therefore, involving a different claim or cause of action although under the same statute.

judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment. Compare *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510-511. The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding."

See, also: *Courtney* v. *Croxton*, 239 Fed. 247 (C. C. A., 6th, 1917); *Guaranty Trust Co.* v. *International Trust Co.*, 144 Misc. (N. Y.) 127 (1932).

The very right now contested by Petitioner was adjudged in the "First Action" in the New York State Court. The same questions of law and of fact were in issue. Judgment was rendered in favor of Anglo and Mondiale, which was paid in full by Petitioner.

The decision in the "First Action" is therefore conclusive as between Petitioner on the one hand and Respondents Mondiale and Anglo, on the other hand, of all the issues at bar, irrespective of any decision as to the applicability of the Joint Resolution to multiple currency clauses, and irrespective of any supervening decision thereon.

POINT F.

At all events, all Respondents are entitled to interest and costs.

The coupons sued upon are independent negotiable instruments; N. I. L., Sec. 25(5); guilders, although a commodity in the United States, are money in Holland; the reference in the coupons to the bond does not destroy their character as independent negotiable instruments; Cf. *Enoch* v. *Brandon*, 249 N. Y. 263 (1928); *Cunningham* v. *Pressed Steel Car Co.*, 238 App. Div. 624 (1st Dept., 1933), aff'd 263 N. Y. 671 (1934); there is deemed *prima facie* to have been valuable consideration; N. I. L., Sec. 50; *Newcombe* v. *Fox*, 1 App. Div. 389 (1st Dept., 1896), aff'd 154 N. Y. 754 (1897): presentment and demand are not necessary, but if the instrument by its terms is payable at a special place and the maker is

able and willing to pay it *there* at maturity according to its terms, and has funds *there* available for that purpose, such ability and willingness are equivalent to a tender of payment on his part. N. I. L., Sec. 130. Payment in guilders to Respondents on presentation in Amsterdam would have fully discharged the obligation on the instruments. N. I. L., Sec. 200(4).

Although they were payable in Holland at the election of the holders, these coupons, payable in a foreign country in the monetary unit of that country, are negotiable instruments, *Amsinck* v. *Rogers*, 189 N. Y. 252 (1907). A note payable in money or, in the alternative, in a commodity or other thing of value, is enforceable. *Dunsmore* v. *Duncan*, 57 N. Y. 573 (1874); *Hosstatter* v. *Wilson*, 36 Barb. (N. Y.) 307, 308 (1862); *Hodges* v. *Shuler*, 22 N. Y. 114 (1860); *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Ry. Co.*, *supra*.

The holder of the instrument could present the same at any time at or after maturity. N. I. L., Sec. 90 *et seq.*; *Shapiro* v. *Weber*, 220 App. Div. 667, 669 (1st Dept., 1927); *Perry* v. *Norddeutscher Lloyd*, 150 Misc. (N. Y.) 73, 74 (1934); *Lace Selling Co.* v. *Barnet Shapiro et al.*, 249 N. Y. 68 (1928); *Rubber Trading Co.* v. *Manhattan Rubber Mfg. Co.*, 221 N. Y. 120 (1917).[41]

It follows that had Petitioner been ready, able and willing to pay the number of guilders demanded in Holland it might have been relieved from the necessity of paying interest for its refusal to pay.

When the coupons became due, however, and Petitioner refused to pay the same, a new and independent duty was imposed upon it; and for the breach of that duty the law assesses interest by way of damages.

Even the Appellate Division, which refused recovery for more than the face dollar amount of the coupons, allowed interest. This was done as the result of a direction from

[41] The Dutch law is to the same effect. See:
H. R., 28 January 1921, N. J. 1921, p. 356;
H. R., 18 May 1926, N. J. 1926, p. 466;
H. R., 24 April 1931; N. J. 1931, p. 1321;
Hof den Haag, 19 October 1934, N. J. 1924, p. 1709;
R. C. Almelo, 14 April 1926, N. J. 1927, p. 24.

Mr. Justice Cohn (one of the majority Judges in that Court), which reads as follows:

> "The order should provide that plaintiffs are entitled to interest from the date the coupons were presented for payment. Neither of the proposed orders so provides. Otherwise the defendant-appellant's order is preferable as to form and substance to the extent that it allows costs and disbursements of this appeal to defendant-appellant, the successful party.
>
> The defendant's order should be revised to include interest on the amounts awarded from the date the coupons were presented for payment."

It is quite evident that one reason why even the Appellate Division below directed that interest be awarded to Respondents is that Petitioner has nowhere alleged or proved its readiness or willingness to pay at the proper place even the dollars which it concededly owed, and which it contended to be the proper amount payable in respect of the coupons sued upon.

The typical allegation in the amended answer which comes closest to a tender (but which falls short thereof) is paragraph numbered 62 thereof (R. 40), wherein Petitioner alleges that on the respective due dates of the coupons[42] it was ready, able and willing to pay the same as they respectively became due *in money of the United States* upon presentation and surrender of said coupons respectively, *at the office or agency of the Petitioner in the City of New York in said United States "as provided in said bonds and in said coupons."* Nowhere in the amended answer is there an allegation of willingness or readiness to pay even the admitted amount of dollars in Amsterdam, the place where Respondents had the right to and did present the coupons (and demanded payment in guilders). Petitioner has not contended (see p. 11 of its reply brief to the Court of Appeals) that the choice of the place of presentation passed to it. Upon its own version, therefore, it was not ready and willing to pay the coupons, even in lawful dollars.

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[42] No allegation at all is made in the amended answer with respect to any readiness, willingness or ability to pay anywhere on the dates of Respondents' demands.

The opposing affidavits are barren of any proof that Petitioner was willing to make even the payments conceded by it to be due, and the typical protests (R. 88-89; R. 89-90) contain no reference to any tender of payment by Petitioner.

Accordingly (without waiving our contention that the judgment below should be affirmed), we respectfully submit that interest was in any event properly assessed against Petitioner.

The rule is stated in *Hamilton* v. *Wheeling Public Service Co.*, 88 W. Va. 573 (1921):

> "With practical uniformity and unanimity the judicial opinion is that such instruments are not mere incidents of the principal debt to which they are attached, but themselves represent separate and distinct contracts for the payment of money when due according to their terms, and, like other promises of a similar character, bear interest after default in payment. 'The manifest purpose in making them was to increase the market value of the bonds by giving assurance of prompt payment of the interest. The intention was to give currency to them as a separate contract, which would carry with them the usual incident of the interest in case of a failure to pay at maturity. * * *.' *Philadelphia etc. R. Co.* v. *Smith*, 105 Pa. 195, 198, 199."

See, also, opinion of Mr. Justice Hofstadter in the "First Action," N. Y. L. J., June 13, 1936, p. 3029, and judgments entered thereon, *which included interest* and which judgments were paid by Petitioner in full, with interest.

It is unnecessary to discuss here the question as to whether or not interest upon interest may be allowed in the absence of a new consideration. Interest is here claimed *by way of damages*. If a suitor were not entitled to interest by way of damages for failure to pay a liquidated amount, an obligor could with impunity refuse to pay any instrument upon the maturity date.

As was said by the Court in *Star Stationery Co.* v. *Rogers*, 88 Fed. (2d) 482 (C. C. A., 3rd, 1937); cert. den. 302 U. S.

691 (1937), quoting from *Curtis* v. *Innerarity*, 6 How. 146, 154 (1848):

> "'Every one who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest *as damages for his non-performance*. Hence it may correctly be said, that such is the implied contract of the parties.'"

The following quotation from the *Curtis* case, just preceding the quotation used by the Court in the *Star Stationery Co.* case, is also pertinent:

> "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest."

It is therefore clear that all Respondents are at all events entitled to interest and costs.

POINT G.

Basic Fallacy of Petitioner's Brief.

One basic fallacy underlies Petitioner's whole brief. It rests its whole case on the statement (p. 46 of its brief) that "* * * the narrow question here presented is whether Congress excepted a particular class of gold bonds."

This misstatement of the issues is based upon a fallacious assumption. Respondents do not contend, and never have contended, that so much of the "bonds" (coupons) as represent "gold" is excepted, or should be excepted, from the Joint Resolution. What Respondents do contend is that in so far as the coupons contain a "gold clause," the obligation contained in the "gold clause" is discharged by payment of an equal amount of lawful money; but in so far as the coupons contain separate and distinct alternative promises to pay in

foreign moneys abroad, exercisable at the option of the holder, the Joint Resolution did not reach, and did not intend to reach, such foreign money alternatives, especially in the hands of foreigners.

Petitioner asserts (p. 29 of its brief) that "respondents are requesting not construction, but amendment of the Resolution." The fact is, of course, that it is Petitioner which is requesting "amendment." Petitioner seeks to read into the Resolution words which are not there,[43] and which never were intended to be there. It utterly ignores the statutory definitions contained within the Joint Resolution itself.[44] It erroneously assumes (p. 28 of its brief) that Respondents seek to be "withdrawn from the application of the Joint Resolution." Respondents take no such position. Insofar as the Joint Resolution applies (i. e., to the "gold clause"), Respondents agree that the coupons are governed thereby; insofar as the Joint Resolution does not apply (i. e., to the promise to pay foreign moneys abroad), the coupons always were, and now are, outside of the scope of the Resolution—whether the problem be approached from the point of view of (a) the actual language employed or (b) the spirit and intent thereof.

Petitioner is thus doing the very thing which it wrongly attributes to Respondents.

Petitioner, furthermore, enunciates a "public policy" which has never been declared and does not exist, and builds its entire case thereon. The short answer to its assumption was made by this Court many years ago, viz.: "What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Haddon* v. *Collector*, 72 U. S. 107, 111 (1866).

---

[43] i. e., foreign moneys.

[44] As this Court said in *Fox* v. *Standard Oil Co.*, *supra*, at page 96:

"In such circumstances definition by the average man or even by the ordinary dictionary with its studied shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others."

The proper approach to the construction of the Joint Resolution is set forth in *The Schooner Paulina's Cargo* v. *United States*, 7 Cranch. 34 (1812), where this Court said (at p. 39):

> "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. * * *
>
> "* * * It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described—not to some other case which judges may conjecture to be equally dangerous."

The statutory intent, as expressed in the "explicit terms" of the Joint Resolution itself, cannot be altered in the interest of an intent "imagined" by Petitioner. *United States* v. *Riggs*, 203 U. S. 136 (1906); *Hyde* v. *Shine*, 199 U. S. 62, 78 (1905).

America is an international creditor nation. Congress did not intend to, and in fact did not, enunciate in the Joint Resolution a public policy which would result in repudiation of *international* debts. Assume that a Dutchman purchased in Holland, upon the basis of a Dutch prospectus, bonds which, by their terms, are payable in Holland in the currency of that country. Did Congress intend by the Joint Resolution to impair the right of foreigners to collect foreign moneys abroad? It certainly gave no evidence of any such intention. The answer, therefore, is an emphatic "No."

Petitioner's brief skips lightly over the record and the arguments pertinent to the instant case. It addresses itself principally to No. 384, where, in substantial part, the issues are entirely different from those upon the present appeal (see pp. 13 *et seq.*, *supra*). A reversal by this Court of the Circuit Court of Appeals in No. 384 would settle the multiple currency issues involved in favor of these Respondents; an affirmance in No. 384 would not be controlling, however.

upon the instant case. Insofar, therefore, as Petitioner's brief relates to No. 384, it is in large part irrelevant.

Nothing adduced by Petitioner has impaired or can impair the fact that the Joint Resolution does not apply, and was not intended to apply, to the foreign money alternatives of the multiple currency coupons here sued upon. Neither public policy nor the Joint Resolution condemn the payments here sought. The language of the Joint Resolution itself, in the light of the definitions contained therein, the decided cases, established principles of law, good conscience and equity, all sustain the decision of the Court of Appeals and the position taken by these Respondents.

CONCLUSION.

The judgment appealed from should be affirmed.

Dated, New York, February 4, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

APPENDIX "A."

PUBLIC RESOLUTION—No. 10—73D CONGRESS
[H. J. Res. 192]

48 STAT. 112, TITLE 31, U. S. C. 463.

JOINT RESOLUTION

To Assure Uniform Value to the Coins and Currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect

thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, at 4.40 p. m.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein Corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of New York [New York County].

SUPPLEMENTAL BRIEF FOR RESPONDENTS, SUBMITTED UPON REARGUMENT.

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480. 39

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Every consideration of equity militates in favor of the payment demanded by Respondents; Petitioner actually received guilders on the security issue here in question; the power of the dollar, and the power of the guilder, which Petitioner originally received upon issuance, have both substantially decreased since issuance, and Respondents, foreigners, have suffered a real and substantial loss thereby.. 18

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Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS, SUBMITTED UPON REARGUMENT.

I.

Preliminary Statement.

This case (together with Nos. 384, 495 and 590) was argued before this Court during the week of February 6, 1939. Since such argument, the opinion in the Court of Appeals below has been officially reported. 279 N. Y. 220 (1939). By order

of this Court entered April 17, 1939, this case and the associated cases were ordered restored to the docket and assigned for reargument on Monday, April 24, 1939, after the cases theretofore assigned for that day.

The questions from the Bench and the arguments at the Bar have suggested certain additional points which Respondents desire to call to the attention of the Court. Accordingly, the following is respectfully submitted as an addition to Respondents' Brief, dated February 4, 1939.

II.

SUMMARY OF ARGUMENT.

Petitioner is estopped from denying its liability upon the foreign money alternatives contained in the coupons. The prospectus under which these Bonds and coupons were issued, as well as the Bonds and coupons themselves, specifically provide for the fixed number of foreign monetary units payable, and Petitioner expressly reiterated its willingness and liability to the investing public to make such payments after the Joint Resolution had been enacted.

The administrative and executive construction of the Joint Resolution, and of the acts *in pari materia*, sustains our contentions.

Under established principles of law, the action taken by Congress in relation to monetary legislation on and subsequent to June 5, 1933, as well as its action and failure to act when viewed in the light of the decision in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.*, support Respondents' contentions that the Joint Resolution does not apply to the multiple currency features of the instruments sued upon.

One of the intents of Congress in the whole devaluation program was to secure a rising price level. A necessary and recognized corollary thereof was the increase in the prices for foreign money.

Every consideration of equity militates in favor of the payment demanded by Respondents; Petitioner actually received guilders on the security issue here in question; the power of the dollar, and the power of the guilder, which Petitioner originally received upon issuance, have both substantially decreased since issuance, and Respondents, foreigners, have suffered a real and substantial loss thereby.

The public policy of the United States, as a creditor country, dictates that there should be no repudiation of international debts; a construction of the Joint Resolution permitting domestic debtors to repudiate debts owing abroad, would undoubtedly result in foreign repudiation of American debts, with a consequent most unfavorable effect upon our domestic economy.

The arguments advanced in Petitioner's reply brief do not alter or impair the conclusions reached by us.

III.

ARGUMENT.

POINT A.

Petitioner is estopped from denying its liability upon the foreign money alternatives contained in the coupons. The Prospectus under which these Bonds and coupons were issued, as well as the Bonds and coupons themselves, specifically provide for the fixed number of foreign monetary units payable, and Petitioner expressly reiterated its willingness and liability to the investing public to make such payments after the Joint Resolution had been enacted.

When the Bonds were originally offered for sale in the United States, simultaneous offerings were made in London and in Amsterdam. The English text of the Dutch Prospectus appears at R. 81; for the information of the Court, a copy of the Dutch offering circular (in Dutch)—omitted in printing pursuant to stipulation (R. 86-87)—is attached hereto, marked "Appendix A." It is certainly

beyond question that the same representations, in respect of payment abroad of the fixed number of foreign monetary units, were made in the listing applications when the Bonds were originally issued, they having been originally listed on the New York, London and Amsterdam Stock Exchanges (R. 55-56).

The record thus clearly establishes from the very inception of the issue a fixed and unequivocal promise to the investing public on the part of Petitioner to pay, in Amsterdam, Holland, at the choice of Respondents, 62.25 guilders in respect of each coupon.

Respondents relied, in their purchase of the Bonds and coupons prior to January 11, 1934, upon the representations and promises contained in the offering circular and in the Bonds and coupons themselves.

On January 11, 1934, Petitioner specifically reiterated its liability and willingness to pay the coupons abroad in the specific number of foreign monetary units set forth therein (R. 57-59).[1] It appears from the record (R. 63 *et seq.*) that a considerable number of the Bonds from which the coupons sued upon were detached were purchased on or subsequent to January 11, 1934. It further appears (R. 69) that such "purchases between January and August were made in reliance on January letter".

As indicating that Petitioner intended its security holders to rely additionally upon the promise reiterated and contained in its letter of January 11, 1934, it appears that it actually paid the coupon maturing May 1, 1934 according to the views expressed in the letter of January 11 (see

[1] Petitioner itself admitted, in its letter of January 11, 1934, that the purpose of providing for payment in foreign countries was to facilitate their sale and distribution in such countries, and the collection of the principal and interest in the currencies of such countries, in specified amounts (R. 58).

As stated by *Madden & Nadler* in their work on "Foreign Securities" (1929), at page 299:

> "The purpose of providing for the payment of debt service of a loan in various currencies is two-fold; first, to increase the marketability of the loan by making it international in character; and second, to reduce the danger of exchange fluctuation.
>
> The larger the number of currencies in which the debt service is payable, the greater the safety to the investor, because it is not likely that all currencies will depreciate at the same time and to the same degree."

R. 53)—that is to say, specifically according to the tenor of the coupons as contended for by us, and without need for any additional documents such as Petitioner seeks to impose by the letter of August 7, 1934 (R. 59-60). See also pages 27-28, 51 of our main brief.

This reiteration and payment by Petitioner took place after the enactment of the Joint Resolution, with full knowledge thereof and with express reference thereto, and in response to a direct inquiry "as to the policy to be followed with respect to the payment of coupons on certain bond issues expressed to be payable in foreign currencies" (R. 57). Obviously, the letter of January 11, addressed to the New York Stock Exchange and published in its bulletin, was intended for publication to the investing public, and was written for the purpose of having the investing public rely thereon—whether such reliance might induce retention of securities previously purchased, or whether it might result in the subsequent acquisition of securities.

Thus with respect to the coupons acquired prior to January 11, 1934, the estoppel against Petitioner runs by reason of its previously expressed promises and by reason of its action in paying the same in foreign currencies. On and subsequent to January 11, 1934, all the foregoing elements of estoppel apply, and in addition thereto a further estoppel is created by the expressed reiteration of Petitioner's promise to pay the guilders abroad, contained in the letter of January 11, 1934 (R. 57-59).

It is, of course, well settled that where one thus relies (as did Respondents) to his detriment upon the acts or words of another, such acts or words having been done or uttered with intention that such reliance be placed thereon, the person performing such acts or uttering such words, is estopped from denying the liability thereby created. *Morgan* v. *Chicago &c. Railroad Co.*, 96 U. S. 716, 720 (1878).[2]

[2] In holding that an estoppel *in pais* existed, this Court used the following language (at p. 720):

"The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them

Not only, therefore, is there an estoppel *in pais*, but also, under the doctrine enunciated by this Court in *United States* v. *Moser*, 266 U. S. 236 (1924), it seems inescapable that even were this Court inclined to hold, in some other case, that the Joint Resolution bars payment such as Respondents seek (and we respectfully submit that it does not do so in any event), nevertheless under the circumstances of this case, having regard to the circumstances of acquisition and retention of the Bonds and coupons, and the judgment already had in the First Action herein (see our main brief, pp. 6 and 7), the judgment appealed from should be affirmed.

POINT B.

The administrative and executive construction of the Joint Resolution, and of the acts *in pari materia*, sustains our contentions.

The Joint Resolution was one of a series of acts relating to the currency. By the *Thomas Amendment* and the other relevant monetary legislation, American debtors were deprived of the right to hold gold or to receive payments in gold. In order to relieve them from payment of their indebtedness in a medium in which they were not permitted to receive the sums due to them, the Joint Resolution was necessary to and did implement the monetary scheme. Thereby an equal balance was created—as indicated in the *Norman*

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from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent. *The Bank of the United States* v. *Lee*, 13 Pet. 107.

He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank* v. *State Bank*, 10 Wall. 604."

At bar, Petitioner went further than the doctrine enunciated and applied by this Court in the *Morgan* case. Petitioner was not silent. It was active. It affirmatively reiterated its willingness and agreement to pay the foreign currencies, which agreement it now seeks to repudiate to the detriment of Respondents.

case[1]—between domestic receipts and domestic disbursements, which were thus put upon a common basis.

But neither the Joint Resolution, nor any of the other monetary legislation, confiscated the gold held abroad by domestics; neither did the Joint Resolution confiscate or devalue the foreign currencies owned by domestics, whether such foreign currencies were actually held within or without the United States.

Petitioner is a gigantic corporation, with an international business. It received the benefit of the increased value of any gold it might have held abroad. Its holdings of foreign exchange received the benefit of any increase in value which may have accrued in foreign exchange; debts which were payable to it in terms of foreign money (say, guilders) continued to be collectible and collected by it in such foreign money; there is no showing (and we may well assume that it is not a fact) that when the dollar was devalued, Petitioner automatically, either voluntarily or otherwise, reduced the number of guilders payable to it by any Dutch debtors. By the same token, the debts payable by it in terms of foreign currencies should continue to be payable in the same medium. The Joint Resolution did not affect, and did not intend to affect, payments promised to be made abroad.

In our main brief (p. 35) we show that the Joint Resolution could not impair the payment promised to be made in Holland and that legislation is territorial only and is confined to the limits over which the law-making power has jurisdiction.[2] The same conclusions have been reached by the Attorney General of the United States in construing the monetary legislation here involved.

Thus, on August 22, 1933, the Attorney General rendered an opinion to the Secretary of the Treasury in relation to the Joint Resolution, and to certain Executive Orders growing out of the monetary legislation.

The Secretary of the Treasury had inquired concerning an application for a license to export gold coin in order to

[1] *Norman v. Baltimore & Ohio Railroad Co.*, 294 U. S. 240 (1935).

comply with a contract entered into in Belgium in September, 1932 (which was prior to the enactment of the Joint Resolution), the contract being performable and payable in Belgium at "a stipulated price in gold dollars".

In his opinion (37 Op. Atty. Gen., 250, 252-253), the Attorney General discusses the Executive Order, sets out the Joint Resolution in full, and, at page 253, uses the following language:

> "It is well established that the laws of a country have no extra-territorial force. *Pennoyer* v. *Neff*, 95 U. S. 714; *Hilton* v. *Guyot*, 159 U. S. 113.
>
> It is also well established that the nature, validity and interpretation of contracts are governed by the laws of the country where the contracts are made and are to be performed. *Bank of United States* v. *Donnally*, 8 Pet. 361; *Scudder* v. *Union National Bank*, 91 U. S. 406; *Withers* v. *Greene*, 9 How. 213.
>
> Since the contract involved herein was made and was to be performed in Belgium, **the rights and obligations of the parties are to be determined in accordance with the laws of Belgium and not by the laws of the United States.** What the laws of Belgium are in this respect is a question of fact, in regard to which I am unable to advise you.[4] However, assuming that the contract is valid and enforceable under the laws of Belgium, it follows that gold coin is actually required by the applicant for fulfillment of the contract." (Emphasis ours.[5])

The analogy to the case at bar is obvious.[6]

The contract at bar was entered into in 1912, more than twenty years prior to the enactment of the Joint Resolution: the payment in the case at bar was promised to be made in guilders in Holland at the choice of the holder, and the holder did actually exercise such a choice (see main brief, pp. 4-5.

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[4] The record in the instant case (No. 591) is the only record in any of the four multiple currency cases now being argued which contains proof of Dutch law in respect to the enforceability of alternative obligations.

[5] Unless otherwise noted, all emphasis in this brief is ours.

[6] As a matter of fact, payment in Holland in guilders (which are not mentioned in the Joint Resolution) is certainly more permissible than payment in gold coin which (if made in the United States) is specifically condemned.

item 6, and Record at pages referred to therein); and, even stronger than the case under review by the Attorney General, the record at bar clearly sets forth the applicable laws of Holland (the place of performance), both in respect of alternative promises, and in respect of monetary legislation (R. 51; see also our main brief, pp. 38, 48, 77, 79-81)—and those applicable laws compel the payments Respondents seek.[7]

The administrative and executive construction thus placed upon the monetary legislation, in consonance with the construction placed thereon by Respondents, is persuasive. Cf. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313, 315 (1933); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84, 85 (1932).

POINT C.

Under established principles of law, the action taken by Congress in relation to monetary legislation on and subsequent to June 5, 1933, as well as its action and failure to act when viewed in the light of the decision in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.*,[8] support Respondents' contentions that the Joint Resolution does not apply to the multiple currency features of the instruments sued upon.

Congress is, of course, presumed to know the law and to enact its legislation in the light of existing court decisions. *Sutherland, Statutory Construction*, p. 929.

The Joint Resolution was enacted June 5, 1933. The *St. Louis Southwestern* case was decided in the District Court for the Southern District of New York by Judge Knox, on July 5, 1935. Judge Knox predicated his decision

[7] See further on this point our main brief (pp. 71-72) in relation to losses of consular officers and employees in foreign countries, due to appreciation of foreign currencies (Act of March 26, 1934, as amended), and references to the Philippine Act of June 19, 1934, and see also 38 Op. Atty. Gen. 71 (1934).

[8] 81 Fed. (2) 11 (C. C. A. [2], 1936); cert. den. 298 U. S. 655 (1936).

partly upon the decision of Judge Lindley, in the *McAdoo* case[9] (which was decided on June 13, 1935).

The opinion of the Circuit Court of Appeals (2nd) affirming Judge Knox's decision was dated January 13, 1936; petition for a writ of certiorari was filed with this Court February 29, 1936, and was denied on April 6, 1936.

All steps of the multiple currency litigation involved in the *St. Louis Southwestern* case received the widest publicity.[10]

Although other monetary legislation relating to devaluation of the dollar, and referring to the Joint Resolution, has been passed by Congress, no single word or syllable appears in any of the legislation which would indicate that Congress disagreed with the conclusions reached by Judge Knox and by Judge Hand in the *St. Louis Southwestern* case. In the light of recent Congressional history, it is incredible, if Congress had thought that these decisions construed the Joint Resolution differently from the manner in which Congress had intended it should be construed, that Congress should have failed to take appropriate action to remedy this condition.

The Congressional action taken following the decision of the *Perry* case[11] serves as a valid illustration for our point.

The decision in the *Perry* case was rendered February 18, 1935. Congress evidently desired to remedy the situation created by the *Perry* decision (to the effect that the Govern-

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[9] *McAdoo* v. *Southern Pacific Co.*, 10 Fed. Supp. 953 (N. D. Cal., S. D., 1935); reversed solely on jurisdictional ground and remanded, 82 Fed. (2) 121 (C. C. A. [9], 1936).

[10] Judge Knox's decision in the Federal District Court was commented upon in a leading editorial in the "New York Times" on July 20, 1935, and was also reported in leading newspapers in at least ten other cities, located in six States. The opinion of the Circuit Court of Appeals for the Second Circuit was noted at considerable length in eight New York City newspapers and in at least fifteen newspapers located in eight different cities and in seven different States. Reports of the application for a petition for certiorari filed on February 29, 1936, appeared in at least sixty-two newspapers, located in fifty-two cities and in twenty-six States in addition to the District of Columbia. Lastly, denial by this Court of the petition for writ of certiorari in the *St. Louis Southwestern* case on April 6, 1936, was carried in reports contained in at least 138 newspapers, located in 107 cities and in thirty-five States in addition to the District of Columbia.

[11] *Perry* v. *United States*, 294 U. S. 330 (1935).

ment could be sued upon its evidences of indebtedness), and was very prompt to take action in that regard. A Bill was immediately introduced (H. J. Res. 348) withdrawing the right to sue the United States on its bonds, and for other similar purposes; as early as July 12, 1935, the Bill in final form had already reached the Committee of the Whole House on the state of the Union, together with Mr. Steagall's majority report, and together also with a minority report. See *Report No. 1519, 74th Congress, 1st Session.*

The Bill actually became a law on August 27, 1935, just six months after the decision in the *Perry* case, and is now found in *31 U. S. C. A.* (*Money and Finance*) as *Sections 773-a, 773-b, 773-c and 773-d. Section 773-b* withdraws consent to sue the United States and *Section 773-d* reads as follows:

> "As used in 773a to 773c of this title the phrase 'gold clause' means a provision contained in or made with respect to an[12] obligation which purports to give the obligee a right to require payment in gold, or in[12] a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, declared to be against public policy by section 463 of this title; and the phrase 'securities of the United States' means the domestic public debt obligations of the United States, including bonds, notes, certificates of indebtedness, and Treasury bills, and other obligations for the repayment of money, or for interest thereon, made, issued or guaranteed by the United States. (Aug. 27, 1935, 6:00 p. m., c. 780, §4, 49 Stat. 939.)"

In *Greenleaf* v. *Goodrich,* 101 U. S. 278, at page 281 (1879), this Court said:

> "Undoubtedly, acts of Congress *in pari materia* are to be construed with reference to each other."

[12] The article "an" reads "any" in the Joint Resolution; the word "in" is absent from the Joint Resolution; otherwise the language used is identical.

In *Polk* v. *Wendall*, 9 Cranch. 87 (1815), at page 95, this Court stated:

> "As all laws on the same subject are to be taken together, it is argued, that this act shows the sense of the legislature, respecting the mode of surveying entries, and must be taken into view, in expounding the various statutes on that subject. It evinces unequivocally the legislatiye opinion, that as the law stood previous to its passage, a joint survey of two entries, belonging to the same person, or to different persons, could not be made."

In the light of the *St. Louis Southwestern* decision, and the doctrine above enunciated, it is especially significant that the definition of the phrase "gold clause" is re-enacted in this law, in words essentially identical with those which appear in the Joint Resolution. It is incredible that these words should have been re-enacted by Congress, limiting their impact to the "gold clause" as defined, if Congress had intended that the Joint Resolution itself should affect the multiple currency features of bonds and coupons—in fact, the re-enactment of the very phrase in another section of the same title as that in which the Joint Resolution appears, is a direct indication that Congress agreed that the Joint Resolution was correctly construed in the *St. Louis Southwestern* case, so far as concerned its impact upon multiple currency instruments. Nor is it incidental that the same language was used; its use must have been intentional, because in Section 773-d direct and specific reference is made to "section 463 of this title"—the Joint Resolution itself.[13]

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[13] Congress, having used the same language in this Act, must be considered as having also adopted the previous construction of the Joint Resolution. *Sessions* v. *Romadka*, 145 U. S. 29, 42 (1891); *Latimer* v. *United States*, 223 U. S. 501, 504 (1912); *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638 (1917), where, at page 644, this Court said:

> "* * * since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well understood meaning which had been given to it by this court."

While the *St. Louis Southwestern* case was not decided by this Court, nevertheless it was litigated to the highest Federal Court to which it could possibly go, and certiorari was denied by this Court.

In the House Committee Report (Report No. 1519, 74th Congress, 1st Session) the definition of the phrase "gold clause" is made clear (as it is also made clear in Section 773-d itself), the following language being used:

> "Section 4 makes clear the meaning of the phrases 'gold clause' and 'securities of the United States', as used in the resolution, defining a 'gold clause' as 'a PROVISION contained in or made with respect to an obligation payable in money of the United States which purports to give the obligee a right to require payment in gold, or in a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, declared to be against public policy by Public Resolution No. 10 of June 5, 1933' * * *" (p. 3).

It is thus apparent from Congress' own definitions that it is only the **"gold clause"** ***provision*** which was intended to be condemned.[14] (See, further, our main brief, Point B, pp. 21 *et seq.*)

In the same House Committee Report reference is made on page 2 to a construction by this Court of certain sections of the Judicial Code; and on pages 5 and 6, in the minority report, specific reference is made to the *Perry* case, and quotations therefrom appear,—all showing conclusively that Section 773-b was adopted specifically in the light of the decision of this Court.

The minority report also shows (p. 5) that the Attorney General and representatives of the Treasury Department appeared on the Bill and testified before the House Banking and Currency Committee, and that an Assistant Attorney General offered a substitute bill.

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[14] If it can be gathered from a subsequent statute *in pari materia* what meaning the Legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning. *United States* v. *Freeman*, 3 How. 556 (1845).

Inasmuch as Congress in this later statute construed the "gold clause" as we construe it, and more especially in the light of the fact that the *St. Louis Southwestern* decision had already been rendered, we believe that the construction for which we here contend is not only the correct one, but the one which Congress had in mind.

Having regard to the fact that the Attorney General had appeared as *amicus curiae* in the *Norman* case, it seems fair to assume that any error in construing the Joint Resolution which Congress or the Executive or Administrative Departments might have thought had been committed in the *St. Louis Southwestern* case would likewise have been corrected at the same time; the omission to legislate in respect to multiple currencies under these circumstances seems conclusive evidence that Congress agreed with that construction.

In *Alexander* v. *Alexandria*, 5 Cranch. 1 (1809), at page 7, Chief Justice Marshall said:

> "If, in a subsequent clause of the same act, provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

See also: *The "Abbotsford,"* 98 U. S. 440, 444 (1878); *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187 (1911)[15]; *Latimer* v. *United States*, 223 U. S. 501, 504 (1912); *Hecht* v. *Malley*, 265 U. S. 144, 153 (1923).

A later illustration of Congressional action is as informative as the one previously discussed.

At the time of writing this brief there is pending in Congress a Bill to extend the time within which the powers relating to the stabilization fund and alteration of the weight of the dollar may be exercised by the President. *H. R. 3325, 76th Congress, 1st Session.*

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[15] Where, at page 199, this Court said:

> "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. *United States* v. *Ryder*, 110 U. S. 729, 740; *United States* v. *LeBris*, 121 U. S. 278, 280; *Logan* v. *United States*, 144 U. S. 263, 302; *United States* v. *Mason*, 218 U. S. 517, 525."

That Bill was reported April 13, 1939, and committed to the Committee of the Whole House on the state of the Union on that day. *House Report No. 406, 76th Congress, 1st Session.* It was passed by the House of Representatives on April 21, 1939.

Page 1 of the Report shows that extended public hearings have been held, at which the testimony of the Secretary of the Treasury and various representatives of the Treasury Department and numerous economists and businessmen was heard. The Report (pp. 1 and 2) discusses the *Gold Reserve Act of 1934;* at page 2 it refers to the Tripartite Declaration of policy relating to monetary affairs, "which has since been adhered to by Belgium, the Netherlands, and Switzerland." It mentions that the "United States is under no agreement with the government of any foreign country to sustain the value of any other currency in relation to the value of the American dollar, * * *." It states that "In the present unsettled international situation, stability is given to international exchange rates by the existence of the power in the United States to deal promptly and effectively with currency depreciation abroad."

At page 3 it refers to "the international monetary and economic situation"; on the same page it quotes a letter, fourteen lines in length, from the President, dated January 19, 1939, in which this phrase is twice used.

At pages 3 and 4 it quotes a statement of the Secretary of the Treasury in which "international monetary relations" or "international exchange" or "principal currencies" is referred to a number of times; at page 4 it refers "to the exchange equalization of stabilization funds of foreign countries," naming the Netherlands and Switzerland on page 5 as countries to which gold may be sold by the United States for the purpose of stabilizing exchange funds.

In the minority report (p. 9) the following language appears:

> "In any event, nothing is to be gained by refusing to recognize the fact that the currency of one nation may—because of economic forces within that nation—be weaker than the currency of a much stronger na-

> tion. If the stronger nation attempts to follow the *depreciation* of the weaker nation, it simply means that the weaker nation will further devalue, and, to be consistent, the stronger nation again devalues."

One of the very purposes of H. R. 3325 is to enable the sale of gold by the United States to foreign countries, in order to stabilize their exchanges; the Netherlands is one of those countries; if, as clearly appears from Report No. 406, it is intended to sell gold to those foreign countries in order to enable them to maintain their exchanges, it is not logical to construe the Joint Resolution as being in derogation of the rights of foreigners to receive such foreign currencies abroad, simply because those foreign currencies now cost more than they formerly did.

Nowhere in the Bill or in the Report is any mention made of the multiple currency features of bonds or coupons, nor is any attempt made to override what Petitioner erroneously claims to be the erroneous conclusion of Judge Hand in the *St. Louis Southwestern* case, as to which certiorari was denied by this Court.

Almost four years have elapsed since Judge Knox's decision, and over three years have elapsed since the denial of certiorari in the *St. Louis Southwestern* case. The conclusion is irresistible that Congress would not have failed to act had it disagreed with the holding in that case.

In *Heald v. District of Columbia*, 254 U. S. 20 (1920), this Court, at page 23, approved the rule that:

> "* * * where provisions of a statute had previous to their reënactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary. *Latimer* v. *United States*, 223 U. S. 501, 504; *Anderson* v. *Pacific Coast S.S. Co.*, 225 U. S. 187, 199; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 644."

Appropriate language is also found in *People* v. *Bloom*, 193 N. Y. 1 (1908), where the Court considered a re-enact-

ment of a section of the New York Civil Practice Act which had previously been construed by it, using the following language at page 9:

> "We have quoted at length from these opinions, because they lay down a principle that governs the ruling in question. They establish the permanent effect of a waiver, and the legislature, *although it has amended the section several times since the earlier decisions were made, has not deemed it necessary to make any change in this respect. If it was not satisfied with our construction of the statute* that a waiver once made is general and not special, lasting and not temporary, *it could easily have provided that it should be limited to a particular purpose, person or trial. Its failure to do so has a bearing of special importance upon its intention,* when the history of the provision and the course of our decisions are taken into consideration."

If Congress was not satisfied with Judge Hand's construction of the Joint Resolution (certiorari denied by this Court) it could easily have provided otherwise. Paraphrasing the words of Judge Vann, in the *Bloom* case:

> "Its failure to do so has a bearing of special importance upon its intention, when the history of the provision,"

and Congress' subsequent enactments and reports, are considered.

POINT D.

One of the intents of Congress in the whole devaluation program was to secure a rising price level. A necessary and recognized corollary thereof was the increase in the prices for foreign money.

Every consideration of equity militates in favor of the payment demanded by Respondents; Petitioner actually received guilders on the security issue here in question; the power of the dollar, and the power of the guilder, which Petitioner originally received upon issuance, have both substantially decreased since issuance, and Respondents, foreigners, have suffered a real and substantial loss thereby.

At pages 38 *et seq.* of its main brief, Petitioner discusses its conception of the legislative history of the Joint Resolution, and the conditions which gave rise to its adoption.

At page 43 it uses the following language:

> "Thus, the first purpose expressed by the Congress in authorizing devaluation was to protect the foreign commerce of the United States *against depreciation in the values of foreign currencies.*"

Adopting this statement as a premise, it is apparent that foreign currencies must necessarily have risen, after devaluation, in relation to the dollar, and, far from being opposed to the spirit and intent of the Joint Resolution, payment in guilders (which are now more valuable than before devaluation) is expressly in line with the declared policy of Congress.

Congress apparently believed that the reduction of the gold content of the dollar would result in a reduction of the value of American money compared with foreign money, and an increase in prices at home. The cheaper American dollar (ergo, the more expensive foreign currency) was intended to make American goods cheaper for foreigners and stimulate exports, particularly, probably, agricultural exports.

The Administration intended a return to the price level of 1926, which it regarded as an equitable ratio for distributing the fruits of industry. A secondary, but even more important result Congress hoped would flow, was an increase in industrial output following the stimulus to industry, introduced by profit margins thus created.

Petitioner, both as a debtor and as a business institution, stood to gain by this policy so far as it proved operative, and did in fact so gain.

As appears from footnote 22 at page 53 of our main brief, only approximately $8,000,000 of Petitioner's multiple currency bonds are outstanding in the hands of the public, out of a total funded debt of approximately $166,000,000. In respect to $158,000,000 of its debt, therefore—approximately 95% thereof—Petitioner has benefited by the devaluation program.

In respect to the remaining $8,000,000 of debt—approximately 5% thereof—Petitioner has benefited to the extent that the "gold clause" has been stricken, but is being compelled to meet its obligation, according to the letter and spirit of the Bonds and coupons in respect of some part thereof.

It comes with poor grace out of Petitioner's mouth to contend that there is any injustice to it or to other debtors similarly situated, when it is compelled, in connection with this trifling percentage of its funded debt, to pay according to its promise.

On grounds of equity, therefore, particularly when historically considered, Petitioner has nothing of which it can justly complain. Petitioner, and other corporations similarly situated, have been the principal gainers by the whole devaluation program. Petitioner and other corporations similarly situated are seeking to secure "the whole pie" for themselves. If the devaluation program accomplished or accomplishes its purpose, commodity prices rise, with consequent higher prices and profits to the debtor (Petitioner), with no extra recompense to the creditor (Respondents).

Another important equitable consideration should be considered. Petitioner's creditors, both foreign and domestic, from the very date of issuance of these Bonds and coupons,

have suffered an economic hardship, initially because of the dollar inflation from 1914 to 1920. In fact, on only a few dates of payment during the entire life of the Bonds here in question, has Petitioner paid interest in dollars of as great a value as those it borrowed.

We append, as Appendix "B," an index of the general price level as published by the Federal Reserve Bank of New York, Reports Department and Research Department.

Taking the 1913 price level as the equivalent of 100, it appears clearly that at no time since 1912 (when the securities here in question were issued) has the dollar had the same purchasing power as it had at the time when Petitioner received it; in fact, in 1920, its purchasing power had decreased by 88%, and even at the present time, its purchasing power is at a discount of 55%.

Substantially similar results are seen when the dollar is viewed in the light of purchasing power, as expressed in terms of wholesale prices. See Appendix C hereto, "Bureau of Labor Statistics," "Purchasing Power of the Dollar Expressed in Terms of Wholesale Prices by Months."

In terms of pig iron, and in terms of composite finished steel, Petitioner has likewise uniformly profited since the date of the issuance of these securities, as appears from the following tabulation compiled from "Metal Statistics, 1938," published by American Metal Market, New York. (Composite pig iron prices, appear at page 38, and composite finished steel prices appear at page 85 thereof).

COMPOSITE PIG IRON PRICES
(United States)

Year	*Dollars per Ton*
1912	14.82
1913	15.42
1914	13.52
1915	14.15
1916	20.31
1917	39.99

COMPOSITE FINISHED STEEL PRICES
(United States)

Year	*Cents per Lb.*
1912	1.62
1913	1.72
1914	1.52
1915	1.63
1916	2.80
1917	4.46

Year	Dollars per Ton
1918	34.38
1919	29.91
1920	43.80
1921	24.05
1922	25.00
1923	27.15
1924	21.87
1925	21.32
1926	21.06
1927	19.35
1928	18.32
1929	19.15
1930	18.18
1931	16.45
1932	14.99
1933	16.30
1934	18.64
1935	19.12
1936	20.00
1937	23.60

Year	Cents per Lb.
1918	3.79
1919	3.32
1920	3.63
1921	2.69
1922	2.31
1923	2.95
1924	2.84
1925	2.68
1926	2.64
1927	2.53
1928	2.50
1929	2.54
1930	2.32
1931	2.20
1932	2.15
1933	2.16
1934	2.42
1935	2.44
1936	2.41
1937	2.84
January 3, 1938	2.90

As to the Economic Situation in Holland (the Place of Payment).

Petitioner actually received guilders upon the sale of this issue of securities to foreigners in Holland.

Foreigners, who are entitled to demand and receive payment in guilders, have suffered real economic damage because the power of the guilder receivable by them to-day is of much less value than the power of the guilder which Petitioner borrowed.

At page 142, in *Yaarcijfers Voor Nederland 1937, Centraal Bureau Voor de Statistiek*, Gravenhage, 1938, appears "cost of living" index in the Netherlands.

The base is stated to be 100 for the period 1911-1913. No figures are reported for the period 1912-1922, but commenc-

ing with 1923, the "cost of living" index, as shown by said statistics, is as follows:

1923.....	174.2	1931.....	151.0
1924.....	177.4	1932.....	140.8
1925.....	178.6	1933.....	139.3
1926.....	168.0	1934.....	140.1
1927.....	167.6	1935.....	136.2
1928.....	169.2	1936.....	131.9
1929.....	167.9	1937.....	137.3
1930.....	160.9		

It thus appears that the purchasing power of the guilder, during the period 1923-1927, was at a discount of as much as 78% in 1925, and in 1937 (the last year covered by the report) was at a discount of 37%, so that no economic advantage is gained by holders of guilder coupons as compared with the value of the guilder which Petitioner received in 1912,—in fact, a distinct economic loss is suffered by them.

In the same publication, at page 136, appears an index of iron and steel prices in the Netherlands, which is as follows:

Year	*Iron*	*Steel*
1913.....	96	97
1927.....	118	162
1928.....	132	156
1929.....	126	157
1930.....	101	149
1931.....	86	139
1932.....	63	145
1933.....	66	145
1934.....	75	145
1935.....	82	139
1936.....	93	119
1937.....	154	171

Viewed in the light of Petitioner's own business, therefore, the power of the guilder demanded by Respondents is at a discount of between 58% and 73%, as compared with the guilder which Petitioner received.[16]

[16] It must be remembered that in this case Petitioner actually sold bonds and coupons in Holland and actually received payments in guilders abroad, and there is a great element of financial and economic justice in compelling it to repay, to foreigners who desire the same, the Dutch currency which it actually received from them.

The net result is that Petitioner has not paid interest in guilders of as great a value as those it borrowed.

Petitioner is to-day conducting an international business and, with specific reference to the Netherlands, it must be receiving either actual guilders or the dollar equivalent of the actual guilders for its sales in that country.

The economic situation at bar is different from that which prevailed in the *Norman* case.

In the first place, in the *Norman* case, no element of payment of foreign currencies in foreign countries was involved. In the second place, from an economic standpoint, the Court was dealing with a railroad corporation whose rates and fares were receivable in American money only, and the bonds of which were payable in American money only. This was expressly recognized by this Court when, among other things, Mr. Chief Justice Hughes, at page 315, used, *inter alia*, the following language:

> "The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services."

The increase in the price level since 1912 created a condition whereby bondholders, both in the United States and in the Netherlands, with a fixed money income, faced a rising cost of living, and whereby Petitioner and other corporations similarly situated received higher prices for their products while enjoying relatively low fixed charges. The money of the creditors (both foreign and domestic) was thus used by such corporations as capital, the profits upon which went to the debtors. The charts heretofore referred to clearly show that during the entire life of the Bonds in question, even during the depression, the value (in terms of purchasing power) of the dollar was not equivalent, in terms of either (a) the cost of living, or (b) general prices, or (c) iron and steel products, to its value at the time the contract was made; and they also show that, during the same period, the value of the guilder (which was received by the

Petitioner in 1912), was not equivalent, in terms of either (a) the cost of living in the Netherlands (and presumably the general price level as well), or (b) iron and steel prices in the Netherlands, to its value at the time the contract was made.

The irresistible conclusion must be that, in equity, Petitioner has been at a relative economic advantage for upwards of twenty years, and that the depression only reduced but did not destroy this relative advantage.

The devaluation of 1933-1934 served only to increase Petitioner's relative advantage. It therefore would suffer no net economic loss even though it paid to these foreign holders the guilders which it had originally contracted to pay—actually it has enjoyed and continues to enjoy a very substantial aggregate gain.

It is thus made plain that real hardship will be imposed upon these foreign creditors if payment is not enforced in accordance with the letter and spirit of the Bonds and coupons, and that no hardship, either legal or economic, is imposed upon Petitioner if the judgment below be affirmed, as we respectfully submit it should be.

POINT E.

The public policy of the United States, as a creditor country, dictates that there should be no repudiation of international debts; a construction of the Joint Resolution permitting domestic debtors to repudiate debts owing abroad, would undoubtedly result in foreign repudiation of American debts, with a consequent most unfavorable effect upon our domestic economy.

As indicated in Point A (pp. 16 *et seq.*) of our main brief, this is not a "gold" or a "gold coin" or a "gold clause" case. Neither the spirit nor the intent of the Joint Resolution affect, or were intended to affect, the rights of foreigners, resident abroad, to demand and receive guilders in Holland, and no public policy inhibits such payment (see pp. 44 *et seq.* of our main brief).

Moreover, the international aspects of the issue in question and the effect of any decision with respect thereto deserve attention. To permit Petitioner to discharge in the United States in dollars, a promise payable in Holland in guilders, would result in a disruption of international vested rights. It would be equivalent to permitting a German corporation, for instance, which owed dollars in the United States, to discharge its obligations to pay such dollars in the United States by paying marks in Germany. In fact, German corporations have actually made such attempts, and have been uniformly rebuffed in our Courts (see cases cited at pp. 49-50 of our main brief).

There are numerous issues of foreign companies, municipalities and governments registered with the Securities and Exchange Commission, many of which are listed upon the registered exchanges in this country (as, for instance, the New York Stock Exchange and the New York Curb Exchange), and many others of which are unlisted, and all of which were presumably offered and sold to American investors.

Let us take as an illustration, for instance, the Gold Dollar Bonds issued by Siemens & Halske Aktiengesellschaft, a German corporation, which were sold in this country. Assume, as is the fact, that Germany has passed monetary legislation restricting or denying the payment of dollars upon these bonds. Our Courts do not recognize the validity of such legislation outside of the territorial confines of Germany, the place of performance specified in the bonds being America, and the unit of currency being the dollar. *Central Hanover Bank & Trust Co.* v. *Siemens & Halske Aktiengesellschaft et al.*, 15 F. Supp. 927 (U. S. D. C., S. D. N. Y., 1936), aff'd 84 F. (2d) 993 (C. C. A., 2nd, 1936); cert. den. 299 U. S. 585 (1936).

Inasmuch as the United States is a creditor country, the public policy of this forum must dictate that there should be no repudiation of international debts.

An examination of the current list of "Bond Quotations, New York Stock Exchange," under the heading, "Foreign Government and Cities", shows that dollar bond issues have been made by 106 different foreign debtors, aggregating an

indebtedness of approximately $3,280,988,000; a similar examination of the current list of "Bond Quotations, N. Y. Curb Exchange", under the heading, "Foreign Government Bonds", shows issues by twenty-four different foreign debtors, aggregating an indebtedness of approximately $172,000,000. This is in addition to private debts.

Foreigners would be encouraged to repudiate all these billions of dollars of debt, were this Court to construe the Joint Resolution in the manner urged by Petitioner, and such a construction might invite retaliatory measures. If American debtors could discharge their guilder bonds payable in Holland (which are after all insignificant in amount) by paying dollars in America, there is no reason why foreign debtors should not be permitted to discharge their dollar bonds payable in America (which are very large) by paying, say, depreciated marks in Germany at the pre-devalution rate of exchange. The construction of the Joint Resolution contended for by Petitioner might therefore result in the destruction of billions of dollars of investments in foreign bonds floated in this country, with the consequent disastrous effect upon our domestic economy. If our citizens expect to, and do, get paid in dollars on the loans of foreign debtors floated in America, reciprocity and the economic interests of the United States both demand that the insignificant number of outstanding issues of domestic corporations payable in foreign monetary units abroad, should be discharged according to their terms, when the holders of such bonds so elect. The Joint Resolution never intended otherwise. It should not, and cannot properly, be construed so as to accomplish any other result.

POINT F.

The arguments advanced in Petitioner's reply brief do not alter or impair the conclusions reached by us.

At pages 4, 5 and 6 of its reply brief Petitioner asserts that significance attaches to what it denominates the complete failure to attempt to meet certain of its arguments. This we deny.

As a matter of fact, all such arguments have been completely answered. A categorical review, as apparently desired by Petitioner, may perhaps, however, be in order.

1. Respondents take no position as to whether or not an alternative provision for payment in gold bullion would be reached by the Joint Resolution. Quite possibly, it might, but such a case is not here for determination. The Joint Resolution condemns "Every provision * * * which purports to give the obligee a right to require payment in gold * * *." Perhaps a payment in gold bullion might be reached by this language. That is a far cry, however, from Petitioner's assertion that payment in Holland of guilders (NOT mentioned in the Joint Resolution) is likewise reached by the same language. Petitioner, by urging such a *non sequitur*, can only confuse the actual issues.

2. Respondents do not urge that the "gold clause" provisions "never became invalid at all", as Petitioner seems to think. The "gold clause" provision actually became invalid under the terms of the Joint Resolution, but in the absence of an election by Respondents, to take "gold" or "gold coin", the question of their right to receive such payment never became an issue.

Petitioner's attempt to confuse the "gold clause" provision with the multiple currency provision can only be due to confused thinking. The holders of those "gold clause" bonds which also contain multiple currency features, had a different contract from that which was held by those bondholders who owned "gold clause" bonds only. In so far as their contract is the same, their treatment under the Joint Resolution is the same. In so far as their contract is different (i. e., in so far as it contains the additional alternative promise to pay foreign currencies abroad) their treatment under the Joint Resolution is entirely different, and they are entitled to recover.

3. Whether or not the ground upon which this Court sustained the resolution in the *Norman* case as an obstruction to the power of Congress over the currency, was the

dislocation of the domestic economy which would have resulted had debtors been required to collect their revenues in the new dollars, and to pay their debts upon the basis of the old, is not material to the issues at bar.

We have heretofore and in our main brief fully discussed the *Norman* case, have shown that no question of multiple currencies was there involved, and, further, we have shown that there is no dislocation of domestic economy involved in the payment demanded by Respondents. Furthermore, there is no showing, and it cannot possibly be a fact, that all Petitioner's revenues are collectible in the new dollars. Petitioner is doing an international business; in fact, the fair inferences are that its revenues are being collected in various currencies, including guilders.[17]

Furthermore, in the *Norman* case, the debtor had never received currency other than United States dollars, whereas at bar, Petitioner actually received guilders for these very securities.

And finally, this Court will not, we submit, fail to decide the constitutional, legal and economic aspects of Congressional legislation, in accordance with the true intent and meaning of that legislation, simply because one debtor speciously urges that performance of its just obligations will cost it more than it is willing to pay.

4. In Respondents' view (as set forth at pages 33-34 of our main brief), there is no reason why alternative foreign money payment provisions may not be employed in the future, as in the past, without either "nullifying" or contravening the Joint Resolution.

Furthermore, Petitioner's assertion that these Respondents are in a dilemma by a so-called "concession" claimed to be made by the Petitioner in No. 384, is wholly without foundation or relevance. These Respondents do not concede that any such provisions ever were intended or are now intended to "evade" the effect of the Joint Resolution, and no such concession was made by the petitioner in No. 384.

[17] Even were this not so, Respondents' legal rights could not be minimized or destroyed by reason thereof.

There is an element of speciousness in Petitioner's argument that a provision in an instrument, inserted in 1912 by Petitioner itself as an inducement to the foreign investing public to purchase Petitioner's securities, could possibly have been so inserted by the securityholders for the purpose of evading a statute which was enacted in 1933.

Respondents stand squarely upon the proposition that the multiple currency features of the Bonds and coupons are wholly valid and enforceable.

CONCLUSION.

The judgment appealed from should be affirmed.

Dated: New York, April 22, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

APPENDIX A.

BETHLEHEM STEEL COMPANY.

UITGIFTE

VAN

$15,200,000 5 pCt. First Lien and Refunding Mortgage 30-jarige Goud Obligatien.

AFLOSBAAR 1 MEI 1942.

De betaling van hoofdsom en rente dezer Obligatiën is gegarandeerd door de Bethlehem Steel Corporation, welke garantie op elke Obligatie is afgedrukt.

Trustee voor de leening: Equitable Trust Company of New York.

Deze uitgifte maakt deel uit van eene geautoriseerde leening groot $ 50,000,000, waarvan, met inbegrip van het thans uit te geven bedrag, $ 17,500,000 uitstaande zullen zijn.

De Obligatiën worden uitgegeven in stukken aan toonder groot $ 1000 en $ 500, welke zoowel voor hoofdsom als rente op naam gesteld kunnen worden, terwijl stukken op naam weder in Obligatiën aan toonder kunnen worden verwisseld.

De leening is aflosbaar 1 Mei 1942, doch kan, naar keuze van de Maatschappij, op elken vervaldag van den interest geheel of gedeeltelijk à 105 pCt. plus loopende reute worden afgelost, mits hiervan twaalf weken van te voren is kennis gegeven.

De Obligatiën zijn voorzien van halfjaarlijksche coupons, vervallende 1 Mei en 1 November.

Hoofdsom en rente zijn betaalbaar te New York in gouden munt der Vereenigde Staten van of gelijk aan den tegenwoordigen standaard voor gewicht en gehalte en te Amsterdam tot den vasten koers van *f* 2.49 per $, zonder aftrek van eenige belasting, welke de Maatschappij verplicht mocht zijn daar-

over te betalen of daarvan af te trekken, ingevolge eenige bestaande of toekomstige wet van de Vereenigde Staten van Amerika of van eenigen Staat, Provincie of Gemeente daarin gelegen.

Er zal een Amortisatiefonds worden gevormd, waarin jaarlijks een bedrag van 2½ pCt. van de op dat tijdstip uitstaande Obligatiën moet worden gestort, welk bedrag echter nooit minder dan $ 300,000 zal mogen bedragen.

Op de basis der netto ontvangsten der Maatschappij over het boekjaar 1911 blijft er, alvorens rekening te houden met afschrijvingen en uitputtingen der ertsmijnen, doch na de betaling van alle vaste lasten, met inbegrip van die voor den dienst der amortisatiefondsen, op de voorafgaande leeningen een bedrag van $ 3,826,618 beschikbaar voor rente op deze $ 15,200,000 First Lien & Refunding Mortgage Obligatiën. Dit cijfer vertegenwoordigt dus meer dan vijfmaal het bedrag voor deze rente benoodigd en meer dan driemaal het bedrag van alle lasten dezer Obligatiën, met inbegrip der kosten voor den dienst van het amortisatiefonds.

De opbrengst dezer $ 15,200,000 Obligatiën zal worden aangewend:

tot intrekking van het geheele uitstaande bedrag groot $ 6,428,000 Bethlehem Steel Company 5-jarige 6 pCt. Verzekerde Goud-Notes;

tot aankoop van $ 2,668,000 Bethlehem Steel Company 5 pCt. First Extension Hypotheek Obligatiën, waardoor het uitstaand bedrag dezer Obligatiën tot $ 8,000,000 wordt teruggebracht, en

tot verschaffing van meerder werkkapitaal.

Van deze Obligatiën blijven $ 2,300,000 in portefeuille voor algemeene doeleinden der Maatschappij, terwijl de resteerende Obligatiën slechts onder in de hypotheek-akte nauwkeurig vastgestelde beperkingen mogen worden uitgegeven voor intrekking van de overige $ 8,000,000 5 pCt. First Extension Hypotheek Obligatiën en voor nieuwen aanbouw of voor verkrijging van meerdere bezittingen, onder bepaling

dat het bedrag der hiervoor uit te geven Obligatiën niet meer dan 90 pCt. van den kostprijs zal mogen vertegenwoordigen, en onder bepaalde voorschriften in verband met de ontvangsten.

De Heeren HOPE & Co. berichten, dat zij op

DINSDAG 21 MEI 1912,

TOT DES NAMIDDAGS 4 UUR,

ten kantore van de Heeren VAN LOON & Co. de inschrijving op bovengenoemde leening openstellen tot den koers van 90¾ pCt. (de $ gerekend à *f* 2.50.)

Bij overteekening zal de toewijzing zooveel mogelijk pondspondsgewijze plaats hebben.

De betaling moet geschieden op den 1 sten Juni 1912 met bijberekening van 1 maand rente à 5 pCt. per jaar.

Door de Heeren HOPE & Co. zullen recepissen worden uitgegeven, welke zoo spoedig mogelijk kosteloos zullen worden verwisseld tegen de definitieve Obligatiën, voorzien van de coupon vervallende 1 November 1912 en volgende.

Het recht wordt voorbehouden inschrijvingen eventueel te weigeren.

De inschrijving op deze leening wordt eveneens opengesteld:

te *New York* bij de Heeren HALLGARTEN & Co., HARVEY FISK & SONS en WILLIAM SALOMON & Co.

en te *Londen* bij de Heeren SALOMON & Co.

Voor verdere bijzonderheden deze Obligatiën betreffende, wordt verwezen naar achterstaande vertaling van een schrijven van den President der Bethlehem Steel Corporation.

AMSTERDAM, 17 Mei 1912.

APPENDIX B.

FEDERAL RESERVE BANK OF NEW YORK, REPORTS DEPARTMENT

INDEX OF THE GENERAL PRICE LEVEL

Varying weights 1913 = 100

Years	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1912	97	98	99	100	100	100	100	100	100	101	100	100

APPENDIX B (continued).

FEDERAL RESERVE BANK OF NEW YORK
RESEARCH DEPARTMENT

1913 = 100

INDEX OF THE GENERAL PRICE LEVEL—INCLUDING SECURITY PRI

REVISION OF 1928*

Years	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1913	100	100	100	100	100	99	100	100	101	101	100	100
1914	100	100	100	100	100	100	100	101	101	100	99	100
1915	100	100	100	101	101	101	102	103	104	107	107	108
1916	110	111	113	114	114	115	115	117	120	122	126	127
1917	128	130	132	136	139	142	141	142	142	142	141	143
1918	144	146	147	149	151	153	155	158	160	162	162	164
1919	163	161	162	164	167	170	174	176	176	178	181	184
1920	188	189	192	196	198	199	198	195	195	192	187	186
1921	177	172	170	167	164	162	160	160	159	159	159	158
1922	156	155	155	156	158	158	159	160	160	161	162	163
1923	165	164	165	165	166	166	165	165	165	166	166	166
1924	167	167	166	165	165	164	165	166	165	165	166	166
1925	169	169	169	168	168	170	170	171	171	172	173	173
1926	173	172	171	171	171	171	171	171	172	171	172	171
1927	170	170	170	169	170	171	170	171	173	173	173	174
1928	173	173	174	175	177	176	176	176	178	177	178	178
1929	179	179	180	179	179	179	181	182	183	181	174	174
1930	174	173	173	174	172	169	167	166	167	163	161	158
1931	157	157	157	155	153	150	149	149	147	144	144	140
1932	138	136	137	134	132	129	129	132	132	131	130	128
1933	127	124	123	124	127	128	132	132	133	133	133	132
1934	133	136	136	137	136	137	138	138	139	139	140	140
1935	141	142	141	142	143	144	145	146	147	148	149	149
1936	150	151	151	150	150	152	154	156	156	156	158	159
1937	161	162	163	162	162	162	163	163	161	158	156	155
1938	155	154	152	152	152	152	155	154	154	155	154	153
1939	155p	154p										

p = Preliminary

COMPONENTS OF THE GENERAL PRICE LEVEL

	Weight		*Weight*
Industrial Prices—Wholesale	10	7. Realty Value—Urban and Farm.	10
Farm Prices at the Farm	10	8. Securities—Bonds and Stocks	10
Retail Food—51 cities	10	9. Equipment and Machinery	10
Rents—32 cities	5	10. Hardware Prices	3
Clothing, Fuel, Furnishings, etc.—Retail	10	11. Automobile Prices	2
Freight—Transportation Costs	5	12. Wages—F. R. B., N. Y. Composite	15

*Published in Harvard Review of Economic Statistics February, 1928, by Carl Snyder and currently in the Monthly Review of Credit and Business Conditions of this bank.

Prices 72.5 (Over)

RENT SOURCES:

Industrial Commodity Prices at Wholesale; "All Other Than Farm and Food," U. S. Department of Labor.

Farm Prices at the Farm; Farm Prices of 47 Commodities, U. S. Department of Agriculture.

Retail Food Prices; 42 Articles of Food in 51 Cities, U. S. Department of Labor.

Rents; Cost of Housing in 32 Cities, U. S. Department of Labor (monthly changes interpolated arithmetically).

Other Cost of Living Items; Cost in 32 Cities of Clothing (wt. 4), Fuel and Light (wt. 1), House Furnishing Goods (wt. 1), and Miscellaneous (wt. 4), U. S. Department of Labor (monthly changes interpolated arithmetically).

Transportation Costs; Railway Freight Receipts per ton-mile. U. S. Interstate Commerce Commission.

Realty Values; Urban, Federal Reserve Bank of New York (wt. 4). Farm, Estimated Value per Acre, U. S. Department of Agriculture (wt. 1).

Security Prices; Preferred Stock (wt. 1), Common Stock (wt. 4), Inverted yield on 60 High-Grade Bonds (wt. 5), Federal Reserve Bank of New York, from data of Standard Statistics Company.

Equipment and Machinery, Federal Reserve Bank of New York.

(a) Electric Car Costs, J. G. Brill Co.

(b) Farm Machinery, U. S. Department of Agriculture.

(c) Telephone Equipment, Western Electric Company.

Wholesale Hardware Prices, U. S. Department of Labor.

Automobile Prices. Average Realized Prices, U. S. Department of Commerce.

Wages, Composite, Federal Reserve Bank of New York.

Wage indexes included in composite index, with weights

		Wts.			*Wts.*
1. Factory	E	35	7. Railroad Building Labor	R	2
2. Building	R	10	8. Retail Trade	+E	10
3. Railroad	E	5	9. Hotels	+E	3
4. Agricultural	R	10	10. Bituminous Coal Mining	+E	4
5. Teachers	R	8	11. Power, Light and Water	+E	2
6. Clerical	E	8	12. Telegraph and Telephone	+E	3

+ Available from 1929 only. E = Earnings. R = Wage rate.

APPENDIX C.

U. S. DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
WASHINGTON

PURCHASING POWER OF THE DOLLAR EXPRESSED IN TERMS OF WHOLESALE PRICES, BY MONTHS 1890 TO 1940

(1926 = $1.00)

Years	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
		*	*	*	*	*	*	*	*	*	*	
1912	1.515	1.499	1.481	1.435	1.429	1.449	1.451	1.435	1.418	1.412	1.425	1.427
1913	1.422	1.433	1.431	1.435	1.451	1.449	1.439	1.435	1.416	1.420	1.427	1.431
1914	1.458	1.464	1.471	1.479	1.484	1.484	1.486	1.437	1.425	1.471	1.481	1.497
1915	1.468	1.458	1.466	1.456	1.449	1.464	1.445	1.458	1.464	1.425	1.295	1.282
1916	1.229	1.274	1.244	1.234	1.212	1.206	1.199	1.175	1.151	1.098	1.027	1.000
1917	.979	.957	.929	.876	.829	.820	.813	.801	.810	.818	.814	.805
1918	.800	.815	.791	.779	.781	.775	.758	.745	.727	.734	.734	.730
1919	.744	.770	.762	.752	.739	.737	.709	.693	.709	.706	.692	.699
1920	.634	.637	.631	.604	.598	.601	.603	.626	.644	.693	.769	.779
1921	.877	.953	.977	1.011	1.040	1.071	1.071	1.070	1.071	1.063	1.062	1.079
1922	1.094	1.076	1.078	1.073	1.041	1.038	1.006	1.014	1.007	1.004	.995	.988
1923	.980	.968	.957	.962	.981	.997	1.016	1.022	1.003	1.006	1.016	1.018
1924	1.004	1.003	1.015	1.028	1.043	1.034	1.046	1.031	1.030	1.018	1.009	.995
1925	.972	.962	.960	.981	.984	.971	.959	.962	.967	.965	.937	.937
1926	.969	.980	.994	.997	.995	.996	1.005	1.009	1.003	1.006	1.016	1.007
1927	1.036	1.044	1.056	1.063	1.062	1.063	1.060	1.050	1.038	1.035	1.038	1.035
1928	1.037	1.044	1.047	1.035	1.026	1.034	1.027	1.025	1.014	1.034	1.044	1.041
1929	1.043	1.048	1.041	1.047	1.056	1.050	1.036	1.038	1.041	1.052	1.070	1.073
1930	1.081	1.094	1.109	1.111	1.126	1.152	1.185	1.186	1.185	1.205	1.230	1.250
1931	1.279	1.302	1.316	1.337	1.366	1.387	1.389	1.387	1.404	1.422	1.433	1.449
1932	1.486	1.508	1.515	1.527	1.553	1.565	1.550	1.534	1.531	1.553	1.563	1.567
1933	1.639	1.672	1.661	1.656	1.595	1.538	1.451	1.439	1.412	1.404	1.406	1.403
1934	1.385	1.359	1.357	1.364	1.357	1.340	1.337	1.309	1.289	1.307	1.307	1.299
1935	1.269	1.258	1.259	1.248	1.247	1.253	1.259	1.242	1.239	1.242	1.241	1.239
1936	1.241	1.241	1.256	1.255	1.272	1.263	1.242	1.225	1.225	1.227	1.214	1.213
1937	1.164	1.159	1.139	1.136	1.144	1.147	1.138	1.143	1.144	1.171	1.200	1.201
1938	1.236	1.253	1.255	1.271	1.280	1.277	1.269	1.280	1.277	1.289	1.290	1.289
1939	1.300	1.300	1.304									

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591.

BETHLEHEM STEEL COMPANY,
Petitioner,
against
ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDRO-PRESS HANDELS, A. G., a Liechtenstein corporation,
Respondents.

RESPONDENTS' REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*.

I.

Preliminary Statement.

This case (together with Nos. 384, 495 and 590) was re-argued before this Court during the week commencing April 24, 1939. During the course of the argument, and on April 26,

1939, a Brief for the United States as *Amicus Curiae* was served and filed, the United States theretofore having taken no part in the case and having given no indication that it would take any position upon the questions before the Court.

This Reply Brief for Respondents is filed pursuant to oral permission given by this Court upon the oral argument.

II.

The Government has apparently misconceived the issues presented, and, accordingly, "The Question Presented" (Govt. Brief, pp. 2 *et seq.*) has not been properly stated by it. Further, the Government erroneously assumes, without more, that "there would appear to be no substantial question as to the constitutionality of" its "suggested application of the Joint Resolution."

The Government quite evidently misconceives the issues presented. Its misconception is based upon eight distinct fallacies which underlie and pervade its entire brief.

1. It erroneously assumes one of the basic questions at issue in this case, as if it were conceded both in fact and in law—namely, it assumes that the United States gold dollar is the fundamental measure of value in the contracts in question (Govt. Brief, pp. 3, 4);

2. It erroneously assumes that Respondents are endeavoring to recover foreign moneys based upon the gold value of the American dollar, which is not the fact. The erroneous assumption is likewise made that the contract was entered into "in contemplation of American law" (Govt. Brief, p. 24);

3. It fails to recognize that the payment in foreign moneys promised in the Bonds and coupons has no relation to and is not governed by "any coin or currency of the United States," and, the election once having been exercised, the instrument became one for the payment in Holland only of guilders only; that the number of foreign monetary units

is fixed in the Bonds and coupons and does not depend upon the dollar; and that, irrespective of currency fluctuations, a creditor exercising his election to take guilders in Holland, could receive no more and no fewer guilders than the amount specifically set out in the Bonds and coupons, whether those guilders happen at that time or at any other time to be worth more or less than the separate, distinct and unrelated amount of dollars or sterling set forth in the same instrument;

4. It fails to recognize that the securities here in question were from their inception, and now are, international in character, having been floated in Holland upon a Dutch prospectus in the Dutch language by a debtor doing an international business, and in America and England upon an English language prospectus (R. 77-80) and subscriptions having been taken in Holland by Dutch banking houses, in England by a British banking house and in New York by an American banking house (R. 81-83);

5. It erroneously assumes (Govt. Brief, footnote 1, p. 2), as if it were a conceded conclusion—which it is not—that "there would appear to be no substantial question as to the constitutionality" of its "suggested application of the Joint Resolution";

6. It erroneously assumes (Govt. Brief, p. 4)—without proof—a Congressional intention to make a distinction between instruments payable in foreign moneys *simpliciter* and those payable in multiple currencies, without one shred of reference to any data which might indicate such a Congressional intention;

7. It ignores relevant administrative and Congressional action, and Petitioner's own concessions;

8. It utterly ignores the fact that performance was required in Holland, that under Dutch law the payment demanded is legal, that the case is a simple one in contracts, and that under well settled Contract and Conflict of Laws doctrines this Court should permit recovery.

The United States Gold Dollar Is Not the Fundamental Measure of Value. The Number of Foreign Monetary Units Sought Is Fixed in the Security Itself and Does Not Change Whether or Not Either the Dollar or the Guilder or, for that Matter, the Pound Sterling, Be More or Less Valuable in Relation to Each Other.

The Government at page 6 *assumes*, without more, and in the face of the circumstance that the contrary is the fact, that this is a "dollar debt," that "The primary purpose of the payment provision * * * was to assure the bondholder that he would receive payment in gold dollars of the standard of value in existence at the time the bonds were issued, or in an equivalent value." and that "the gold dollar clause remained the fundamental and dominant measure of value." There is nothing in the record to justify any such statement. In fact, the record justifies the conclusion that the foreign money alternative was inserted specifically for the purpose of assuring payments abroad in foreign moneys (see, for instance, American and Dutch offering circulars, R. 77-82; also Petitioner's letter to the Stock Exchange, R. 57-59; our Supp. Brief, Appendix A), and in the particular case at bar, it further appears that all the purchases were "made to protect obligations in currencies other than dollars" (R. 69).

The decisions in the *Norman* and *Holyoke* cases, when used in the manner cited by the Government (Govt. Brief, p. 3), take the cases out of their setting, and are entirely inapropos.

The distinctions seem self-evident:

(a) In the *Norman* case the bonds were *domestic obligations* ONLY, and *payable in gold dollars* ONLY, no question of payments abroad or of foreign currencies, or of right of election to take foreign currencies, being involved (see, among other things, our Main Brief, pp. 17, 29, 42, 52, 65); and

(b) In the *Holyoke* case the alternative payments were keyed to, dependent upon, and measured in value by, gold or a particular kind of coin or currency of the United States (see our Main Brief, p. 57 *et seq.*).

The *Inversiones* case is dragged in by the ears at page 12, although the bonds there contained only, as the Government concedes, "a straight gold coin clause" payable solely in this country, and the citation is therefore not relevant (see also, our Main Brief, pp. 17, 76).

The Government (Govt. Brief, p. 10) has adopted an argument heretofore made on behalf of one of the respondents to the effect that the "obligation" [1] is "capable of being paid in dollars" merely because the instrument contains the separate "gold clause" promise.

Without enlarging upon the arguments heretofore advanced by us upon this point (see our Main Brief, Point B, pp. 21 *et seq.*), we submit that the words are not susceptible of the construction for which the Government contends, as is exemplified by the following definition of the word "payable," found in *Ballantine's Law Dictionary* (1930), at p. 944:

> "*payable* (*pā'a-bl*) When the word is used in commercial transactions, and in instruments such as a promissory note, it signifies 'to be paid,' rather than 'which may be paid' (Century Dictionary); and it does not imply any alternative condition, privilege, or option, but it does imply the positive and absolute condition of payment **at the time, place, and in the specific funds, named.** See Johnson v. Dooley, 65 Ark. 71, 40 L. R. A. 74, 44 S. W. Rep. 1032." (Emphasis ours.) [2]

See, also, decision of New York Court of Appeals, below, R. 109.

It becomes relevant to advert to the argument originally made by Petitioner in connection with the use of the word "obligation," now impliedly adopted by the Government. Petitioner was evidently driven from its original statement that the word "obligation" meant the whole instrument, and that the whole instrument could be discharged by payment "dollar for dollar," to the position that only the "money payment" features of the instrument were intended to be

[1] To pay guilders abroad.

[2] Unless otherwise noted, all emphasis in this brief is ours.

affected by the Joint Resolution, including, however (accor
ing to Petitioner), the foreign money alternatives. But th
later construction of the word "obligation" would have th
same result as if it were construed to mean the whole instr
ment itself; if the concession is once made, as it has bee
made by Petitioner, that the word "obligation" refers onl
to the "money payment" provision, then it seems clear, a
a necessary corollary thereof, that it can refer only to th
United States money payment obligation, because "coin o
currency of the United States" are the only kinds of "coi
or currency" with which the Joint Resolution purports t
deal. Furthermore, the Government's construction woul
seek to accomplish a discharge by having Petitioner pa
"dollar for guilder" (not "dollar for dollar," as the Joi
Resolution provides), and would also destroy the covena
of negotiability contained in the Bond (R. 29).

Petitioner seeks (this is also the effect of the Governmen
suggestion) to accomplish by substitution of dictionar
definitions, a reading of the Joint Resolution different fro
its plain words. Substitutions of dictionary definitions ar
ineffective aids to statutory construction (see quotatio
from *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96 (1935), i
footnote 44, p. 99 of our Main Brief), and lead to absur
and inconceivable results. Example: "A giraffe is a fou
footed animal." A horse is also a four-footed animal. B
substitutions of definitions, we reach the absurd result: "A
giraffe is a horse." Exactly the same result is sought to b
achieved by Petitioner when it substitutes what it states t
be a selected dictionary definition of the word "obligation,
i. e., the word "contract," and so seeks to justify its con
struction of the Joint Resolution.

The word "obligation" as used in the Joint Resolutio
refers only to that particular "obligation" (i. e., debt o
duty) which is provided to be payable in the proscribe
mediums.[3] As applied to the securities here in suit, it refer

[3] Viz., (a) "gold," or (b) "a particular kind of coin or currency of th
United States," or (c) "an amount in money of the United States measure
thereby," i. e., measured by "gold" or by "a particular kind of coin or currenc
of the United States."

only to the "gold clause" term of the securities, and not to the separate and independent foreign money alternatives.

This case is a simple one in contracts, involving merely the application of accepted doctrines of Contracts and Conflict of Laws.

The Securities Sued Upon Are International Contracts and Have Been Such Since Their Inception.

The Government evidently fails to appreciate that the securities before this Court were sold by Petitioner to its creditors under and pursuant to the terms of a separate, distinct and independent Dutch offering prospectus (see R. 81-83; see also our Supp. Brief, Appendix A), and were purchased by such Dutch purchasers, presumably in reliance upon the equally independent and separate foreign money alternatives therein contained (including the guilder and the pound sterling), which have at all times been relied upon by these purchasers and their successors in title, under accepted principles of negotiability, as containing separate, distinct and alternative options exercisable at their own election; moreover, the construction of the instrument by the debtor itself from time immemorial so far as the contract is concerned, even beyond the date of the Joint Resolution (see our Supp. Brief, Point A, pp. 3 *et seq.*) has been exactly in line with the interpretation which Respondents in this case have hitherto advanced, and which was sustained as a matter of contract interpretation by the New York Court of Appeals, in the State Court below (R. 109).

There can be no question, under every circumstance contained in the Record, that the securities before the Court were in their inception international in character, and have remained such ever since; and that after election by the foreign holder under and pursuant to the terms of the instruments themselves (as both the creditor and the debtor understood and construed those terms), it became an international debt payable thereafter in terms of guilders only. The Government's attempt to place this transaction entirely in America must, under every circumstance of the Record and the admitted facts therein contained, meet with failure, and

its further attempt to distinguish between international debts in general and this particular debt (which is also clearly international in character) is created merely to conform with the basic fallacies which run throughout the Government brief.

There Is Grave Doubt as to the Constitutionality of the Government's Suggested Interpretation of the Joint Resolution.

Constitutionally, Congress is without power to regulate or govern payments to be made abroad (even were such payments to be made in gold coin,[4] which the payment here sought is not); certainly Congress is without power and did not attempt to regulate the payment of guilders to be made in a foreign country.

This the Government fails to recognize in its bland assumption that its suggested interpretation would raise "no substantial question as to the constitutionality * * * of the Joint Resolution" (Govt. Brief, footnote 1, p. 2). On the original argument before this Court and on the reargument questions from the Bench indicated that the contention of Petitioner (in which the Government now belatedly joins) would raise the gravest doubts as to the constitutionality of the Joint Resolution as applied to the contract upon which Respondents sue. That such an extra-territorial interpretation might well make the Joint Resolution unconstitutional in this respect has already been discussed. See our Main Brief, pp. 35, 54, 74.

Furthermore, the construction of the Joint Resolution contended for by the Government would not only destroy these constitutional rights (in the sense discussed at page 35 *et seq.*, 54 *et seq.* and 74 of our Main Brief), but would additionally result in the destruction of the promises found in the Bonds (R. 29) that "This bond shall pass by delivery," and that the coupons shall be negotiable and "shall continue to be transferable by delivery merely."

If extrinsic evidence of foreign ownership prior to June 5, 1933, is required as a condition of payment, then the

[4] 37 Op. Atty. Gen., 230 (1933), cited and discussed in our Supp. Brief, p. 7 *et seq.*

negotiability of the promise is impaired, and the additional valuable property right of negotiability is thereby destroyed.

The very fact (as conceded by the Government, Govt. Brief, footnote 3, p. 7) that the debtor may well have received a "few points more" for its Bonds by the insertion of the multiple currency clause lends weight to our contentions.

Even on the Government's own present theory (which we do not concede) that debtors were relieved by the Joint Resolution from paying abroad in currencies not mentioned therein, the Joint Resolution could not work exact equality in each and every case; the debtors having been discharged from by far the greater proportion of all their indebtedness by the striking of the "gold clause," the legislation could not seek to correct every small detail of every debt owing by them, and if, incidentally (as is the case here), 5% of a particular company's debt must be discharged in the medium originally contracted, the substantial purposes of the Joint Resolution—(which nowhere condemns such payment)—even as now suggested by the Government,—have been more than fully accomplished. *Gant* v. *Oklahoma City*, 289 U. S. 98, 102 (1933); *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, 428 (1936); cf. *United States* v. *Mo. Pac. R. Co.*, 278 U. S., 269, 279-280 (1929).

At page 11 the Government refers to a "windfall" and to "unjustified enrichment," again citing the *Norman*, *Holyoke* and *Perry* cases. Such language might be applicable to those cases, which covered domestic securities only which were payable in dollars only; but in the instant case the "windfall" and the "unjustified enrichment," if any, will be for the benefit of the debtor and not of the creditor, if the Government's suggestion is adopted (see our Supp. Brief, Point D, pp. 18-24, showing that Petitioner has never paid either dollars or guilders of equal power to those which it borrowed, and that only about 5% of Petitioner's total funded debt contains multiple currency clauses).[5]

[5] Appendix C to the Government Brief is utterly misleading. In the first place, it compares the cost with 105% of par; in the second place, and more importantly, it fails to emphasize that the value of the guilder has substantially depreciated since the Bonds were purchased. By the same line of reasoning, if a comparison were made with pre-war marks, such tabulations could show an enormous alleged profit. The effect of such arguments would be to enable a debtor to default in the performance of its just obligations, and then to let it profit by its own default.

Congressional and Administrative Action Belie the Government's Assumption of Any Congressional "Intent" to Prevent the Payments Here Sought.

At pages 13 and 14 of its Brief, the Government blandly concludes that "Congress appropriately included these obligations within the scope of the Joint Resolution," but cites no reasoning, authority or proof for any such conclusion. It admits that ordinarily the fundamental purpose of international securities of this character is to meet the desire on the part of the foreigner to receive payment in the currency of his own country where he lives and transacts business, and in which currency his debts are payable, concluding that "Congress recognizing the merit of the position of a creditor in these and comparable situations very properly left the consequences of the revaluation of the dollar to be borne in such instances by the debtor." The facts support our views.

The Bonds in the instant case were offered and sold in three countries, America, England and Holland (R. 78). If ever there was an international contract, these Bonds represent such a contract. If, as stated by the Government, Congress desired to exclude "international obligations" from the operation of the Joint Resolution, then the multiple currency features of these Bonds must be excluded therefrom; and, if, as indicated by the Government, Congress also desired to exclude payments in foreign moneys *simpliciter*, from the operation of the Joint Resolution, the same reasoning compels the conclusion that the multiple currency features of these securities must likewise be excluded therefrom.

The Government overlooks the fact that once the holder of the security here in question exercised his right to take guilders in Holland, the contract became an international contract to pay guilders merely,—exactly of the type which the Government concedes in its brief (p. 3) is not within the scope of the Joint Resolution.

Congress could not discriminate between a simple instrument payable in foreign moneys, and an instrument which

became so payable as the result of a choice legally conferred, a part of the original consideration to the purchasers of the securities.

At page 9 the Government states that "the Resolution reveals an intention 'to stop the whole business' * * *."

In the first place, the Joint Resolution reveals no such intention; but, more importantly, in the second place, what is "the whole business" which the Joint Resolution intended to stop? The whole "business" is the "gold clause" only, and there is no evidence whatsoever of any intention to "stop" any other "business," *i. e.*, to stop payments of guilders abroad on these or any other securities.

No shred of evidence appears, either in the Congressional data or in the Joint Resolution itself, or in the acts *in pari materia*, or in any of the administrative regulations, which indicates any intention to exercise any such unconstitutional power as the Government now suggests,—in fact, quite the contrary is the case (see, as supporting our position and disproving the Government's assumption, the quotation from *Nussbaum*, 84 U. of P. L. R. 573, set out in Point B(6) of our Main Brief, p. 44; also see 37 *Op. Atty. Gen.*, 250, 252-253, set out at p. 8 of our Supp. Brief).

The Government's position, now advanced for the first time, is utterly inconsistent with its previous position, both on the part of Congress itself (see our Supp. Brief, Point C, pp. 9 *et seq.*) and as set out by the opinion of the Attorney General, and also as disclosed by the other governmental departments.

For instance, the Securities and Exchange Commission accepts, for registration, issues of securities containing provisions for payment in two or more countries, in the currencies of those countries, and expressly provides in its questionnaire for information on that subject. See, for instance, *Application for Registration*, Form 21. of *"The Toyo Takushoku Kabushiki Kaisha"* (*The Oriental Development Company, Ltd.*) for its 30-year 6% gold debenture bonds, and its 30-year 5½% gold debenture bonds, which application

(pp. 7 and 8) is dated February 13, 1936, where the following questions and answers appear:

> "(m) State the currency or currencies in which payable; and if payable in two or more currencies, state the basis of determination for the currency conversion and at whose option.
>
> The 6% Gold Debenture Bond.
>
> The service is to be payable in New York in U. S. dollars, or at the option of the holder, in London in sterling money of Great Britain or in Tokyo in yen, in each case at the current buying rate of sight exchange on New York.
>
> The 5½% Gold Debenture Bond.
>
> The service is to be payable in New York in U. S. dollars."

These issues are now listed upon the New York Stock Exchange. If foreign money alternatives were proscribed, such listing and registration would obviously have been denied.

A further illustration of our point is also found by reference to *Section 372 of 31 U. S. C. A.* (*Money and Finance*), providing for the proclamation of the values of foreign moneys, pursuant to which the Treasury Department publishes periodically the values of foreign monetary units for the purpose of collecting customs dues. These publications have been continuously issued both before and after the enactment of the Joint Resolution, the latest thereof being dated April 1, 1939, from which it appears that the "value in terms of U. S. money" of the guilder is fixed at **$.6806**, and where, under the heading of "Remarks," the Government makes the following statement in respect of the guilder:

> "Suspension of convertibility of notes into gold and restrictions placed on free gold exports—Sept. 26, 1936; gold export prohibition repealed by decree June 28, 1938."[6]

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[6] *Values of Foreign Moneys, Treasury Department, Office of the Secretary, Washington, D. C., April 1, 1939—Department Circular No. 1, Director of the Mint.*

If the Government sees no objection to collecting its duties upon the basis of an appreciated guilder, it follows that it must see no objection to payment by a private obligor in the guilders which it had contracted to pay, even though their value had appreciated.

As further evidencing the administrative construction to the effect that the payment of guilders abroad upon these securities has never been considered as being in violation either of the Joint Resolution or of any act *in pari materia*, we refer to *Treasury Department Regulations*, effective November 12, 1934, signed by the Secretary of the Treasury and approved by the President, which supplement and further implement *Executive Order No. 6560*, dated January 15, 1934, cited at page 46 of our main brief. Article 2 of the Regulations provides as follows:

> "Article 2. (General License Granted.)—Licenses may be granted, and a general license is hereby granted, to all individuals, partnerships, associations, and corporations, authorizing any and all transactions in foreign exchange, transfers of credit, and exports of currency (other than gold certificates) and silver coin. The general license herein granted authorizes transactions to be carried out which are permitted by the Executive Order of January 15, 1934, under license therefor issued pursuant to such Executive Order; but does not authorize any transaction to be carried out which, at the time, is prohibited by any other order or by any law, ruling or regulation."[7]

Article 3 of the same *Regulations* provides that "in order that Federal Reserve Banks may keep themselves currently informed as to foreign exchange transactions and transfers of credit," as provided in *Executive Order No. 6560* above cited by us, "every person engaging in any transaction, transfer, export or withdrawal shall furnish to the Federal Reserve Bank of the District in which such person has his principal place of business in the United States, complete information relative thereto, upon report forms prescribed by the Secretary of the Treasury, except that reports are not required to

[7] We know of no prohibitory order, ruling or regulation applicable here.

be furnished * * *" by certain persons under certain specified circumstances not relevant here.

Inasmuch as Petitioner, according to its own admissions (see our Main Brief, p. 28), has been "voluntarily" paying guilders abroad to certain holders of these Bonds, we may fairly assume that the required reports of these transactions have been made, and that the necessary information has been in the possession of the administrative branches of the Government since June 5, 1933; and if such payments came, as we believe they did, within the express permission of *Executive Order No. 6560* of January 15, 1934, then the construction for which we contend is, of course, supported; if, on the other hand, such payments did not come within such express permission, and permission was required, then the granting of such permission by the governmental authorities likewise supports the position for which we contend; and, in any event, the knowledge of such payments—being brought home to the Government through the Federal Reserve Bank by means of the reports provided for in *Treasury Department Regulations of November 12, 1934*—must be deemed to constitute an acquiescence by the Government in our construction that such payments are in no way prohibited or affected by the Joint Resolution.

The morass into which the reasoning of the Government would lead is exemplified by the following hypothetical situation:

Take, for instance, the Respondent in No. 590, which is an international insurance company, as Petitioner is an international industrial enterprise. It is of course a well-known fact that insurance companies invest some of their assets in the various countries in which they insure and reinsure risks, so as to make available in those countries the currencies of those countries with which to pay possible losses. See, for example, *Article 15 of the Swiss Insurance Law*, and *Decree dated September 11, 1931, Concerning Control of Private Insurance Companies*, the prescriptions of which, in part, have the necessary effect that if, for instance, a Dutch company has insured a Dutch life in guilders which is reinsured by a Swiss company, the Swiss reinsurance company must invest in securities which are payable in Dutch cur-

rency; see also, for instance, in regard to investments of domestic insurance companies, *Section 16 of the Insurance Law of the State of New York*, sub-sections 1, 2 and 3 of which are set forth in the footnote.[8] Suppose, for instance, that the Zurich Company (the Respondent in No. 590) insured a risk for the Bethlehem Steel Company (the Petitioner therein) in Holland in terms of Dutch guilders. Suppose that, in order to protect its risk, it invested in the multiple currency bonds of the Bethlehem Steel Company, which are payable alternatively in guilders in Holland at the option of the holder. A loss then actually occurs in Holland which the Zurich Company is required to meet in guilders, and for that purpose it thereupon seeks to collect upon the Dutch guilder feature of the Bethlehem Steel Company bonds.

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[8] "1. The cash capital of every domestic insurance corporation required to have a capital, to the extent of the minimum capital required by law, shall be invested and kept invested in the stocks or bonds of the United States or of this state, not estimated above their current market value, or in the bonds of a county or incorporated city in this state authorized to be issued by the legislature, not estimated above their par value or their current market value, or in bonds and mortgages on improved unencumbered real property in this state worth fifty per centum more than the amount loaned thereon.

"2. The cash capital of every foreign insurance corporation to the extent of the minimum capital required of a like domestic corporation shall be invested and kept invested in the same class of securities specified for domestic insurance corporations, except that like securities of the home state of an insurance corporation organized under the laws of another state of the United States, shall be recognized as legal investments for the amount of the minimum capital required.

"3. The residue of the capital and the surplus money and funds of every domestic insurance corporation over and above its capital and the deposit that it may be required to make with the superintendent, may be invested in or loaned on the pledge of any of the securities in which deposits are required to be invested or in the public stocks or bonds of any one of the United States, or in bonds and mortgages on improved unencumbered real property in this state worth fifty per centum more than the amount loaned thereon, or in notes or bonds secured by mortgage or trust deed (including any part of an issue of such notes or bonds) insured by the federal housing administrator under provisions of an act of the congress of the United States, entitled "national housing act" in effect June twenty-seventh, nineteen hundred thirty-four, or in debentures issued by the federal housing administrator pursuant to said national housing act, and any amendments thereto which hereafter may be made, or except as in this chapter otherwise provided, in the stocks, shares, bonds or other evidences of indebtedness of any solvent institution, created or existing under the laws of the United States or of any state thereof, or in adequately secured equipment trust certificates or other adequately secured instruments evidencing an interest in transportation equipment and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment, or in adequately secured certificates of trustees or receivers of any such institutions which, or the assets of which, are being administered under the direction of any court having jurisdiction, or in such real estate as it is authorized by this chapter to hold."

According to the Government, Bethlehem Steel Company could discharge its obligation by paying *in the United States* a fixed number of *dollars*, instead of paying *in Holland the fixed number of guilders set forth in the Bonds*. The Zurich Company, on the other hand, would be compelled to meet its obligation in guilders in Holland in full, while the Bethlehem Steel Company would, in the self-same transaction, be relieved from performing its own obligations. Congress could never have intended any such result; it would be unconscionable, illegal and unconstitutional; but such a result is inevitable if the Government's suggestion is sustained.

The Government Brief, in Appendix D, purports to set out a summary of bonds of American corporations, interest on which is payable at the option of the holder either in American dollars or in one or more foreign currencies, at a fixed rate of exchange—"by type of currency option." The table is somewhat misleading. Bonds payable in American and Canadian dollars, or in American dollars, Canadian dollars and sterling, or in American dollars and sterling, surely cannot affect the domestic economy, since both sterling and Canadian dollars are selling either "at a parity," or "at a discount."

"All other options" are thereupon lumped together, and it is indicated that $307,000,000—of "all other options" are outstanding, of which $22,000,000 are stated to represent foreign holdings; and that of these totals, a certain number are in default, or have now been called, and that there are now outstanding and not in default, "all other options" amounting to $102,000,000—of which $13,000,000 are stated to represent foreign holdings.

Even if the "all other options" represented the true amount of multiple currency bonds, alternatively payable in currencies selling at a "premium"—which it quite apparently does not—the total amount thereof, as disclosed by the "Appendix," is insignificant, representing, as it would, *approximately one-tenth of 1%* of the total amount of "gold clause" securities outstanding, with a consequent insignificant impact upon the domestic economy.

But there are only an insignificant number and amount of multiple currency bonds outstanding, with optional payments in "premium currencies" (see footnote 22, p. 53 of our Main Brief). The total outstanding in the hands of the public and not in default is approximately $35,000,000 only—representing less than 5% of the funded debts of the corporations involved and an insignificant fraction of 1% of bonds containing the conventional "gold clause."

These comments on the statistics used by the Government apply irrespective of, and in addition to, the fact that the multiple currency features of the Bonds were never intended to be affected by the Joint Resolution, and are not of the character which the Joint Resolution sought to reach.

A compilation of foreign bonds registered with the Securities and Exchange Commission, and dealt in in the United States, shows that the total thereof is at least the sum of $2,355,000,514.[9] To some extent, this last-mentioned figure overlaps the figure of $3,280,988,000 referred to at page 26 of our Supplemental Brief, and to some extent it is in addition thereto, the $3,280,988,000 figure representing issues listed on the New York Stock Exchange, and the $2,355,514,000 figure representing registered issues, whether or not so listed. Included within the $2,355,514,000 are a number of issues payable either in dollars or at the option of the holder in various foreign currencies, as, for instance, City of Antwerp bonds payable in dollars in New York or pounds in London; Berlin Electric Underground bonds payable in dollars in New York or guilders in Amsterdam; Kingdom of Bulgaria bonds payable in dollars in New York or Belgian francs in Brussels, or lire in Milan, or Swiss francs in Zurich; Canadian Pacific bonds payable in dollars in New York or Canadian dollars in Montreal; Republic of Colombia bonds payable in dollars in New York or pounds in London; General Electric Company of Germany bonds payable in dollars in New York or pounds in London; Rhine Westphalia Electric Power Corporation bonds payable in dollars in New

[9] This figure is based upon a compilation made from registration statements and other information on file with the Securities and Exchange Commission in New York City.

York or guilders in Amsterdam, or pounds in London or kroner in Stockholm.

It would be just as logical for these foreign issuers to declare that dollars may no longer be paid in America upon their dollar bonds—but that, for instance, instead, German marks must be received in Germany at some predevaluation rate of exchange, despite the express agreement on the part of the issuer to pay foreign moneys in another country—as it would be, in the case at bar, to hold that Petitioner may pay dollars in America after the bondholder had elected, pursuant to the terms of the Bond, to take guilders in Amsterdam.

This Case Is Really a Simple Problem in Contracts, Requiring the Application of Conventional Doctrines of Contract and Conflict of Laws. The Contract at Bar Is Payable and Performable in Holland. The Law of Holland Permits Recovery of Guilders and the Law of the United States Permits Recovery of Damages for Failure to Deliver Guilders Abroad. The Government Has Overlooked the Fact that the Foreign Decisions It Cites Apply the Joint Resolution to the "Gold Clause" in Bonds Where the United States Was Provided as the Place of Payment, and Dollars as the Medium. Applying Conflict Principles, and Upon the Reasoning of Those Cases Themselves, as Well as Upon the Authority of Other Foreign Cases involving the Joint Resolution, Respondents Are Entitled to Recover.

(a) As to the Right of Election:

Upon the oral argument, a question was asked from the Bench in respect of the foreign currency alternative in the Bonds.

Even were the promise ambiguous (which we deny), doubts ensuing therefrom are resolved in favor of the promisee, Respondents at bar. *Williston on Contracts*, Sec. 621.

Where the option is given to the creditor, the party to whom the option is given has the right of election.

See *Williston on Contracts*, Section 781, as follows:

"§781. Alternative contracts.

A contract may give an option to one or both parties either to perform a specified act or to make a payment; and though this form of contract cannot be used as a cover for the enforcement of a penalty, yet if on a true construction it appears that it was intended to give a real option, (that is that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable) the contract will be enforced according to its terms. (citing cases) * * *"

In respect of alternative contracts, as at bar, the law is stated in *Restatement, Contracts,* as follows.

§325. Breach of an Alternative Contract.

* * * * * * *

(2) When an alternative contract has ceased to be alternative by reason of an election by the party having the option, by impossibility of performing one or more of the alternatives, or otherwise, a breach as to the one remaining alternative may occur in the same way as if the contract had originally provided for only that performance."

The Dutch Law, *Articles 1308-1313 of the Dutch Civil Code* (see R. 51) is to the same effect.

The option at bar is specifically provided for in the Bond itself (R. 27-28). No question has ever been raised in this case contesting the right of the creditor to make the election. Counsel for Petitioner, upon oral argument in this Court, specifically conceded that this was the fact, and that Petitioner had always construed the option as being in the creditor. To the extent that it is possible for anything to be the "law of the case" in this Court, we respectfully submit that the fact that the option resides in the creditor at bar is settled here. Furthermore, the question, if any existed, as to where the option of election resided, is a State Court question. Inasmuch as, concededly, the right resided in the

obligee at bar, this Court should not in any event examine the question anew of its own motion. *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

But even if the option were ambiguous, which we respectfully submit it is not, Petitioner itself, in the letter of January 11, 1934, to the New York Stock Exchange, construed the language as providing for payment **in foreign countries in the currencies of such countries, at the options of the holders, in the amounts specified in the coupons for such countries**, using the following words (R. 58):

> "The apparent purpose of providing for payment of the interest on and the principal of such bonds in foreign countries was to facilitate their sale and distribution in such countries by enabling residents of such countries who might purchase any of such bonds to collect such interest and principal at the respective maturity dates **in such countries and in the currencies of such countries in specified amounts.** In accordance with such purpose, we made or will make provision whereby owners of such bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof **in such countries and in the currencies of such countries in the amount specified in such coupons for such countries.**"

In *Moran* v. *Standard Oil Co.*, 211 N. Y. 187 (1914), Mr. Justice Cardozo, in construing an agreement, stated (at p. 196):

> "Since the language is the defendant's we must construe it, if its meaning is doubtful, most favorably to the plaintiff. (*Gillet* v. *Bank of America*, 160 N. Y. 549, 555; *Marshall* v. *Com'l Tr. Mut. Acc. Assn.*, 170 N. Y. 434.) We must also give its words the meaning which the defendant ought reasonably to have understood that the plaintiff would put upon them."

See, further, *Restatement, Contracts*, Section 236 (d), and Comment on Clause (d);[10] *Williston on Contracts*, Section 621.[11]

In *Insurance Company* v. *Dutcher*, 95 U. S. 269 (1877), this Court used the following language at page 273:

> "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as any thing else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

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[10] *Restatement, Contracts:*

"§236. Secondary Rules Aiding Application of Standards of Interpretation. * * *

(d) Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law. * * *."

Comment on Clause (d):

"d. Since one who speaks or writes, can, by exactness of expression, more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved against the former in favor of the latter. The other party will ordinarily be the promisee of the promise in question, so that it is generally true that the contract, if ambiguous, will be construed in favor of the promisee; but as the promisor is not invariably the draftsman of his own promise, the rule is more exactly that stated in Clause (d). This rule finds frequent application in regard to policies of insurance, which are ordinarily prepared solely by the insurance company, and, therefore, the words of the policies are construed most strongly against it. In some instances, however, the exact language not only of insurance policies, but of bills of lading and other contracts, is determined by statute. In such cases there is no reason for such an interpretation."

[11] *Williston on Contracts:*

"§621. Secondary rules. Language will be construed most strongly against the party using it.

Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter (citing cases); and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be construed in favor of the promisee (citing authority). * * *"

The New York law is to the same effect. See *Nicoll* v. *Sands*, 131 N. Y. 19 (1892), where the New York Court of Appeals used the following language at page 24:

> "The practical construction put upon a contract by the parties to it, is sometimes almost conclusive as to its meaning. (*Woolsey* v. *Funke*, 121 N. Y. 87, at 92; *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273.)"

(b) EFFECT OF PETITIONER'S CONCESSION:

On the legal principles involved, Petitioner has conceded itself out of court, and the Government's arguments must therefore likewise fail. Petitioner, by "voluntarily" paying guilders abroad to selected Bondholders, concedes that in principle the Joint Resolution does not apply to payments abroad in guilders on the Bonds here in question. Every Bond reads exactly like every other Bond. The practical construction thus placed upon the contract by Petitioner itself (i. e., to the necessary effect that the payments abroad are not payments either (a) in "gold," or (b) in "a particular kind of coin or currency of the United States," or (c) in "an amount in money of the United States measured thereby" and that payments in guilders in Amsterdam are not prohibited) must bind the Government as *Amicus Curiae*, and entitles Respondents to the recovery here sought. See *Insurance Company* v. *Dutcher, supra; Nicoll* v. *Sands, supra.*

(c) AS TO THE PRINCIPLES OF CONTRACT AND CONFLICT OF LAWS INVOLVED:

So far as the contract may have been or is now performable in the United States and payable in American currency within the United States, New York domestic law applies; but so far as the contract is performable in Holland as the result of Respondents' election (i. e., the guilder limb), the instruments are payable in guilders in that country, and under well settled Conflict principles, the law of Holland, the place of performance, applies.

In its brief (footnote 6, page 12), the statement is made by the Government that:

> "* * * SO FAR AS WE HAVE BEEN ABLE TO ASCERTAIN, nearly every foreign court that has had occasion to pass upon the question has applied the Joint Resolution to gold dollar obligations issued by foreign governments and nationals thereof whether owned by Americans or others,"

citing certain cases to be found in *Nussbaum, "Money in the Law"* (1939), pp. 387 *et seq.*, and citing also *Nussbaum's* book.

The citations are misleading. Either the book has not been read, or the cases have been misunderstood, or the Government has not grasped the reasoning of the cases cited by it. The cases cited by the Government, as will appear in the very section of *Nussbaum's* book cited by it, apply the Joint Resolution to the "GOLD CLAUSE" of bonds, PAYABLE IN THE UNITED STATES, IN DOLLARS OF THE UNITED STATES, and the foreign Courts applied the law of the place of performance (the United States).

At page 388, for instance, analyzing *Rex* v. *International Trustee for the Protection of Bondholders*,[12] *Nussbaum* states that the House of Lords

> "* * * held that the English Government had submitted to American Law and was therefore entitled to rely on the Joint Resolution. * * *"

At page 389, referring to the Swedish decision, Nussbaum states that the *Swedish Court* relied on the fact that the important contacts of the bonds were nearly all American; at page 390, that the *Norwegian Court* followed the same line of reasoning; further, at page 390, that the Austrian Court "based its opinion cumulatively on three grounds: that the currency chosen was American ('law of currency theory'); that the bonds, in fact, were issued in the United States ('place-of-contract' theory); and that the United States was the place of payment ('place of payment' theory)."

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[12] Cited as [1937] A. C. 500 [H. of L.]; see our Main Brief, pages 79, 80, for official citation.

It thus appears that properly construed the decisions cited by the Government involved nothing more nor less than the application of accepted Conflict of Laws principles, and, applying the same principles to the case at bar, the place of payment chosen being Amsterdam, Holland, and the medium of currency chosen being the Dutch guilder, the reasoning of the cases cited by the Government would compel the recovery for which Respondents sue.

As stated by *Nussbaum* himself at page 389, in discussing the cases cited by the Government:

> **"In all these cases the United States (New York) was the exclusive place of payment, a place of issuance not being indicated on the bonds."**

Nussbaum himself, in his various articles[13] and in the very book *"Money In The Law"* referred to by the Government (see Section 35 thereof, "Multiple Currency Clauses," at pages 447 *et seq.* thereof) adopts the construction of the Joint Resolution for which we contend, citing among others, many foreign cases.

Other foreign decisions not cited by the Government are also of interest.

Thus, in a case decided by the Supreme Court of the Netherlands High Council, March 13, 1936, entitled *Vereininging voor den Effectenhandel* (*plaintiff, appellant*) v. *Nederlandsche Maatschaapij tot Exploitatie van Petroleumbronnen in Nederlandsch-Indie* (*defendant, respondent*), the DUTCH COURTS, in considering an action against a Dutch corporation, held that the Joint Resolution was not applicable, and, overruling the Court of Appeal below, found "the obligation[14] to pay in Amsterdam is not impaired in law by the Joint Resolution * * *," finding, among other things, as follows:

> "That the loan of the Koninklijke, even although being an American agreement, governed by American law, has, precisely because of its having been made

[13] See, for instance, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Review, 53 (1934); *Multiple Currency and Index Clauses*, 84 U. of P. L. R. 569 (1936).

[14] Of the DUTCH CORPORATION in question.

payable also outside the United States of America, an international character, whilst by establishing a right to payment in this country, in order to make the subscription to the loan for the Dutch public more attractive, the loan has entered into the sphere of Dutch interest;"

The result of this DUTCH decision was to apply the law of the place of performance, and to compel a DUTCH corporate defendant to pay in Amsterdam the value of gold dollars, and is all the more remarkable in that the payment in Holland, provided for in the bonds, was "at the buying rate * * * for sight exchange on New York City" (which seemingly might have resulted in making the dollar the primary medium of payment), whereas at bar the number of foreign monetary units is fixed and determined and is not dependent in any way upon the dollar. The case at bar is therefore much stronger for Respondents than the one which the Dutch Court had before it.[15]

It is of interest to note that at the same time the Dutch Court had before it a dollar loan of the *Batavsche Petroleum Company;* but in the latter case it found that the United States was the place of payment, and in that case, on Conflict of Law principles, denied more than the dollar recovery. (No official citation available, found in *Bull. Inst. Jur. Intl.*, vol. 34, pp. 315-321.)

Recently, also, the FRENCH COURTS had occasion to consider the impact of the Canadian Joint Resolution upon the bonds of a FRENCH CORPORATION. *Mouren* v. *Societe des Services Contractuels des Messageries Maritimes*, in the Court for Civil Matters of The Department of the Seine (Part 1), decided November 16, 1938, reported in Gazette du Palais, November 26, 1938.

In that case, a prospectus was published in Holland, mentioning that the securities were to be serviced in Canadian gold currency, and offering to the subscribers the option to obtain payment of the interest either in Canada (in

[15] For a collection of cases, foreign and domestic, involving the Joint Resolution, see Plesch, *The Gold Clause, a Collection of International Cases and Opinions*, Vol. 2, 2nd Ed., Stevens & Sons, Ltd., London. (1936).

Canadian gold dollars), or in the Netherlands in Dutch guilders, at the prevailing rate of the day, and it was announced that listing of the issue would be requested on the Amsterdam Stock Exchange.[16] The bonds, as finally issued, did *not* contain the optional foreign currency clause, and provided only for payment in Canada in gold currency of the Dominion of Canada.[17] Nevertheless, the French Court, in a suit against a French defendant, held the Canadian Joint Resolution to be inapplicable in France (due in part to the international character of the loan), and ordered the defendant to pay to the plaintiff "the counter value in Dutch Guilders at the rate in force on the date when payment is to be made, * * *." (The decision is in the French language and the quotations are translations.)

To the same effect are the *"Conclusions of Attorney General Berger, Attached to the Supreme Court of the Netherlands, in the matters concerning the loan of the Societe des Services Contractuels des Messageries Maritimes,"* reported in Nieuwe Rotterdamsche Courant, March 3, 1939.

See also a decision of the Federal Supreme Court of Switzerland, Part I for Civil Affairs, February 1, 1938, in the matter of *Allgemeine Elektricitaets Gesellschaft* (*A.E.G.*) of Berlin and *Siemens & Halske Aktiengesellschaft* of Berlin v. *Journaliag, Aktiengesellschaft* (Corporation) of Glarus (published in Paris by the Librairie de Jurisprudence Ancienne et Moderne—Plesch, "Die Goldklausel"[18]). At pages 173 to 190, the Swiss Court, finding that part of the loan was intended for Switzerland, and that the Court was not concerned with the question of whether or not the particular bonds were floated in Switzerland ("inasmuch as all creditors must receive like treatment"), rejected a contention such as is advanced at bar, using the following language:

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[16] This circumstance is similar to the circumstance at bar, the offering circular at bar (R. 77) indicating that an application would be made to list on the New York Stock Exchange, and, if deemed desirable, on one or more foreign exchanges, and the Bonds actually having been listed on the New York, London and Amsterdam Stock Exchanges (R. 55-56).

[17] In this respect, the case at bar is stronger, because the Bonds actually contain the "optional clause" (R. 28).

[18] The publication is in German and the quotations are translations.

"However, it must not be demanded beyond this that each individual holder of a bond submits proof with regard to the acquisition of his bond prior to the enactment of the German law covering bonds in foreign currency, or possibly of the Joint Resolution. This will also not be admissible for the reason that it would be in conflict with the essence of a bond to subject to different treatments bonds of the same loan which cannot be distinguished externally, namely, depending on whether they have been received in Switzerland prior to or after a focal date (Hartenstein in the Juristische Wochenschrift 1936 II 2019, item 5). Aside from this it would also lead to practically insurmountable difficulties if in each individual case the origin of the bond and the time of acquisition of purchase would have to be proven. Therefore, all bonds of the same loan must enjoy like treatment, and the result of this is that at least in cases of the kind referred to above, in connection with which there exists a legally sufficient internal relationship, all bondholders may refer to the Swiss public policy."

The Court refused to apply the German Exchange restrictions, and further stated that "it need not be decided whether the American Joint Resolution was not inapplicable to the gold clause question in the case under consideration here also for the reason that it claims only a strictly territorial application." and ordered payment of the counter value abroad of United States gold dollars.

A similar decision was reached by the Court for Civil Matters of the Department of the Seine on July 23, 1936, in *Guebhard* v. *Siemens & Halske A. G. and Siemens-Schuckertwerke G.M.B.H.*, to be found at pages 45-51 of "Recueil D'Arrets Et De Consultations Sur La Clause-Or," Plesch, published by the Librairie de Jurisprudence Ancienne & Moderne, in Paris, 1937.

In our Main Brief (p. 79), we refer to a case involving the Canadian Joint Resolution. *British & French Trust Corporation, Ltd.* v. *New Brunswick Railway Co., Ltd.*, 54 The Times L. R. 172 (1937) (Court of Appeal) (affirmed by the House of Lords, December 13, 1938, 55 The Times L. R. 260).

The Court of Appeal decided that England was the place of performance in the particular gold clause bond involved (which was issued by a Canadian corporation and payable in British sterling, or optionally in Canadian dollars).

The Court of Appeal found (54 The Times L. R. at 173):

> "* * * that the law of England governed the transaction both with regard to the mode of payment and the measure of the amount of payment,"

thus applying the same doctrine of Conflict of Laws which, we submit, compels a decision in favor of Respondents at bar.

It is thus seen that the foreign decisions, as well as domestic law, sustain Respondents' contentions, and that no valid argument has been presented which impairs Respondents' right to recover in full as sued for by them.

III.

CONCLUSION.

The Government brief, based as it is upon a misunderstanding of the legal, constitutional, and economic problems involved, and being in express conflict with the Congressional and administrative construction of the Joint Resolution (in so far as concerns its application to the multiple currency features of the Bonds and coupons) creates no basis for disagreeing with the New York Court of Appeals below.

The judgment appealed from should be affirmed.

Dated, New York, May 2, 1939.

Respectfully submitted,

HARRY HOFFMAN.
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

FILE COPY

Supreme Court, U. S.
FILED
MAY 27 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

MOTION FOR ORDER STAYING ISSUANCE OF MANDATE, AND EXHIBIT THERETO.

HARRY HOFFMAN,
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The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480. 39

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Respondents.

MOTION FOR ORDER STAYING ISSUANCE OF MANDATE.

May it please this Honorable Court:

Now come the above-named Respondents, ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein

corporation, by HARRY HOFFMAN, their counsel, and present this, their motion for an order staying the issuance of the mandate of this Honorable Court herein, and in support thereof respectfully show:

1. This cause, together with *Guaranty Trust Company of New York* v. *Henwood et al.* (No. 384) and *Chemical Bank & Trust Company* v. *Henwood et al.* (No. 495) and *Bethlehem Steel Company* v. *Zurich General Accident & Liability Insurance Company, Limited* (No. 590), was argued during the week of February 6, 1939, and by order of this Court entered April 17, 1939, was restored to the docket and assigned for reargument on April 24, 1939, and was reargued during the week of April 24, 1939.

2. On May 22, 1939, the opinions of Mr. Justice Black, writing for a majority of this Court, were delivered in all of the above-mentioned causes (... U. S. ...).

3. On the same day the dissenting opinion of Mr. Justice Stone, concurred in by the Chief Justice, Mr. Justice McReynolds and Mr. Justice Butler, was delivered in Nos. 384 and 495, and the dissent of the four last-mentioned Justices was noted to the opinion in Nos. 590 and 591, the dissent being based upon "reasons stated in the opinion of Mr. Justice Stone in No. 384 * * *" (... U. S. ...).

4. This motion is made pursuant to Rule XXXIV of the Rules of the Supreme Court of the United States.

5. The reason why this motion is made, and the good cause upon which Respondents rely for the granting thereof, is that Respondents intend to present to this Court a petition for rehearing pursuant to Rule XXXIII, and that if such rehearing is granted, and the Court should thereafter change its determination, it would not be in order for a mandate to issue upon the present decision, and harm would accrue to Respondents by reason of the entry of judgment against them.

A copy of said petition for rehearing, setting forth the grounds relied upon by Respondents for the granting thereof, is hereto annexed and made a part hereof.

6. Less than twenty-five days have expired from the date of the entry of judgment herein, Respondents have received no notice of an application to shorten the time for the issuance of said mandate, and to the best of the knowledge, information and belief of Respondents, the mandate of this Honorable Court has not yet issued herein. Such knowledge, information and belief is based upon a telegram from the Clerk of this Court dated May 25, 1939.

For the foregoing reasons it is respectfully requested that this motion for an order staying the issuance of the mandate of this Honorable Court be granted, and that an order issue out of this Honorable Court staying the issuance of the mandate herein pending the hearing and determination of Respondents' petition for rehearing, and pending the determination of this Court upon such rehearing, if granted, and pending the further order of this Honorable Court.

And Respondents pray for such other, further and different relief as to this Honorable Court may seem just and proper in the premises.

Written notice of Respondents' intention to make the foregoing motion was given to Frederick H. Wood, Esq., and Messrs. Cravath, deGersdorff, Swaine & Wood, counsel and attorneys for Petitioner herein, by letter dated May 24, 1939, and mailed on that day.

Dated, New York, May 25, 1939.

HARRY HOFFMAN,
Counsel for Respondents,
30 Pine Street,
New York, N. Y.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

EXHIBIT TO MOTION FOR ORDER STAYING ISSUANCE OF MANDATE.

IN THE

Supreme Court of the United States

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Respondents.

RESPONDENT'S PETITION FOR REHEARING.

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30 Pine Street,
New York, N. Y.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

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Respondents.

PETITION FOR REHEARING.

MAY IT PLEASE THIS HONORABLE COURT:

Come now the above-named Respondents, Anglo-Continentale Treuhand, A. G., a Liechtenstein corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein corporation, and Hydropress Handels, A. G., a Liechtenstein cor-

poration, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

1. This cause, together with *Guaranty Trust Company of New York* v. *Henwood et al.* (No. 384) and *Chemical Bank & Trust Company* v. *Henwood et al.* (No. 495) and *Bethlehem Steel Company* v. *Zurich General Accident & Liability Insurance Company, Limited* (No. 590), was argued during the week of February 6, 1939, and by order of this Court entered April 17, 1939, was restored to the docket and assigned for reargument on April 24, 1939, and was reargued during the week of April 24, 1939.

2. (a) This motion is made pursuant to Rule XXXIII of the Rules of the Supreme Court of the United States.

(b) Respondents intend to move this Honorable Court for an order staying the issuance of its mandate herein pending the hearing and determination of this petition for rehearing, and pending a determination upon such rehearing, if granted, and pending the further order of this Honorable Court.

3. The majority opinion herein rests its decision in substantial part upon the majority opinion in Nos. 384 and 495, October Term, 1938. *Guaranty Trust Company of New York* v. *Henwood et al.*, and *Chemical Bank & Trust Company* v. *Henwood et al.*; . . . U. S. . . .

4. The majority opinion in the instant case (Clerk's Advance Sheet, p. 2) states that in the absence of any claim of international rights based upon the treaty provisions of the Constitution, it is enough that Respondents' bonds are "obligations payable in the money of the United States."

The question of treaty provisions was not raised in the courts below by Petitioner, nor upon the briefs or oral arguments in this Court, and under such circumstances the question of rights based upon the treaty provisions of the Constitution was not discussed by Petitioner. Treaty rights, if any, which may be affected, are treaty rights not only with

Holland, but also treaty rights with any other country, since nationals of countries other than the place of payment (Holland) might be affected. It is respectfully submitted, however, that whether or not any rights accrue to Respondents based upon the treaty provisions of the Constitution, principles of international law and principles of comity with foreign nations should induce a revision of the decision of the majority and permit the guilder payment sought. The impact upon the domestic economy, and the effect upon coin and currency of the United States (if any), is equally as great in the case of simple guilder contracts as it is in the case of the alternative promises herein sued upon.

5. The majority opinion reaches the conclusion that the promise herein to pay guilders abroad was specifically condemned by the Joint Resolution.[1] It is respectfully submitted that, upon reconsideration, it will be found that the Joint Resolution does not condemn and that no public policy inhibits such payment. The portion of the report of the Senate Committee on the Resolution quoted in the majority opinion (p. 7 of the Clerk's Advance Sheet in Nos. 384 and 495) relates to "the withdrawal and hoarding of gold," and it is respectfully submitted that promises to pay foreign moneys (although contained in instruments which at the same time contain promises to pay United States dollars) are not mentioned in the report, and do not appear to have been considered by Congress, and therefore that this Court should, on further consideration, revise its decision and hold that the Joint Resolution does not condemn the payment here sought (see cases cited at pp. 25-26 of our main brief).

6. The majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, pp. 2 *et seq.*) states that the bonds there involved were issued and sold in the United States, that purchasers paid dollars, that interest was regularly paid in dollars, and that in that case the asserted right to guilder payment was authorized by the terms of the mortgage securing the bonds.

[1] 48 Stat. 112, 31 U. S. C. A. 463.

At bar, however, bonds were sold in foreign countries, foreign moneys were paid (R. 78, 81), interest was paid in foreign currencies (R. 58-59) and the right to guilder payment is sued upon by the bondholders in their individual rights, irrespective of any terms of the mortgage.[2]

In the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 5) it is also stated, among other things, that the debtor was not required to keep any foreign offices; a different circumstance prevails in the case at bar, where the debtor agreed to pay "at **designated offices** in said foreign cities and countries" (form of bond, R. 28), and where Petitioner in fact actually maintained such foreign offices (see, for instance, typical allegation in moving affidavit concerning presentment for payment "in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co.," R. 45 etc.).

7. (a) In the interpretation of the contract at bar (viz., that it was a contract to pay foreign moneys abroad), involving as it does the construction of a negotiable instrument, the construction of the highest State Court is binding upon this Court. *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487 (1934); *Marine Bank* v. *Kalt-Zimmers Co.*, 293 U. S. 357 (1934); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

Under such circumstance, the construction of these bonds and coupons by the highest New York State Court (the Court

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[2] As a matter of fact, in the instant case, it appears that Petitioner "made * * * provision whereby owners of such bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, **have received** * * * payment thereof in such countries and in the currencies of such countries in the amount specified in such coupons for such countries" (R. 58).

The majority opinion does not deal with the question of the right of a person who owned bonds prior to June 5, 1933, and who still owns such bonds, and who collected his coupons in guilders in Holland prior to 1933, to continue to collect such coupons in guilders after that date; nor with the right of the successors in interest of any such person.

It is a fact, for instance, although not in the record in this case, that a list of bond numbers has been published in Amsterdam, as being bonds upon which Petitioner would continue to pay coupons in guilders for the reason that it had ascertained that on June 5, 1933 and continuously thereafter, such bonds were owned by a *bona fide* resident or residents of a country or countries other than the United States, and Petitioner itself has conceded its liability to pay the coupons upon such bonds in guilders and that it has so paid and would continue to pay the same (see letter of August 7, 1934, written in behalf of Petitioner, R. 59; see form of statement required by Petitioner in connection with such payments, R. 60-a).

of Appeals) should be binding upon this Court, and the decision arrived at should be reconsidered.

(b) The law of the State of New York, in the courts of which this action was originally brought, is to the effect that the bonds may be sued upon at maturity as independent negotiable instruments, irrespective of the terms of the mortgage, and are not limited thereby. *Enoch* v. *Brandon*, 249 N. Y. 263 (1928); *General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794, 800 (1922), aff'd 235 N. Y. 133 (1923); *Cunningham* v. *Pressed Steel Car Co.*, 238 App. Div. 624 (1933), aff'd 263 N. Y. 671 (1934).

(c) The law of the State of New York is also that the coupons here sued upon are independent negotiable instruments and may be sued upon at maturity, irrespective of the provisions of the bonds or of the mortgage, and not limited thereby. *Evertson* v. *National Bank of Newport*, 66 N. Y. 14 (1876), cited with approval in *Chase National Bank* v. *Faurot*, 149 N. Y. 532, 536 (1896).

(d) The language in the bonds here in suit referring to the trust mortgage (R. 28) does not, under New York law, limit the right of the holder of the bonds or coupons, at the maturity date, to sue for the recovery of the money amount. See cases cited under Points 7 (b) and 7 (c), *supra*.

(e) No attempt has been made at bar to enforce any of the provisions of the mortgage itself.

(f) The reasoning of the decision in Nos. 384 and 495, therefore, does not apply to the instant case.

8. In No. 384 the action was brought by a corporate trustee under the terms of the indenture, which in that case was stated by the majority to be a domestic obligation.[3]

[3] In the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 5) the majority refers to responsibilities and duties of the trustee under the mortgage as domestic obligations. The judicial proceedings therein referred to, to be had in this country, relate to proceedings concerning the distribution of the assets, viz., the foreclosure of the mortgage, a circumstance not present in the instant case where the bondholders sue upon the coupons, in their individual right, and where no attempt is made to proceed under any provision of the mortgage.

At bar, however, the suit is brought by the holders of the coupons in their individual right, upon the coupons themselves—an international "obligation" (without reference to the mortgage indenture)—and the law of the place of performance of the coupons (at bar, Holland)—rather than the law of the place of making or even of the performance of the mortgage—should determine their interpretation, their nature, and the obligations enforceable under them. *Restatement, Conflict of Laws*, Secs. 358 (a) and (e), 360, 364; *Scudder* v. *Union National Bank*, 91 U. S. 406 (1875); *Sceman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403 (1927).

9. The decision of the majority, holding in effect that the obligation may be discharged by payment in lawful money, does not treat with the question of the right of the holder of the bonds and coupons to present and demand payment thereof, according to their tenor, in foreign countries (at bar, Amsterdam, Holland), in the respective foreign countries, nor with the obligation of Petitioner in respect of such a demand. The decision of the majority does not indicate whether a holder of these multiple currency instruments, payable in various countries in various currencies, must now present such instruments in America only, or may still present the same abroad, although the decision does hold that the obligation may be discharged in lawful American dollars.

10. *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 453, 459 (1889) (cited at p. 7 of the Clerk's Advance Sheet in Nos. 384 and 495), involved the determination of a contract of affreightment in so far as regarded the effect of a stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage. The general rule applicable to the forum in which tort actions may be brought (viz., that the proper forum is the place where the injury occurred) was therefore applicable in that case, and the stipulation was therefore unenforceable *ab initio*. At bar, however, the obligation related to the enforcement of a contract. Thus, a determination as to the law

applicable to a tort action, as construed in *Liverpool Steam Co.* v. *Phenix Insurance Co.*, would appear not to be applicable to the circumstances here at bar, and the law of the place of performance should be applied. See Point 8, *supra*.

11. *United States* v. *North Carolina*, 136 U. S. 211, 222 (1890), cited in footnote No. 4 of the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 7), involved a suit between sovereigns and it does not appear that the State of North Carolina had subjected itself to the laws of New York. The decision in that case therefore seems inapplicable at bar. Cf. *Murray* v. *Schooner Charming Betsy*, 2 Cranch. 64 (1804); *The Apollon*, 9 Wheat. 362 (1824); *Schooner Exchange* v. *McFaddon*, 7 Cranch. 116 (1812).

Further, in the cited case the decision rests partly upon the conclusion that the intention of the parties was *merely to promote the convenience* of bondholders in making the bonds payable in two separate cities, whereas at bar the express intention was to make payments in foreign monetary units abroad. See Point 12, *infra*.

12. At page 10 of the opinion in Nos. 384 and 495, the majority of this Court make the following statement:

> "Here, the admitted purpose of the multiple currency provision supplementing the gold clause was the same as that of the gold clause itself, that is, to afford creditors of United States debtors on domestic money obligations contractual protection against possible depreciation of United States money."

Whether or not such purpose was admitted in Nos. 384 and 495, no such purpose was admitted in the instant case, and the contrary is the fact. The offering in England and in Holland, considered in the further light of the Dutch offering circular in the Dutch language, supplemented by the listing of these bonds upon the London and Amsterdam Stock Exchanges and the trading thereof in Amsterdam (R. 56), further supplemented by

the statement of Petitioner itself (quoted also at p. 20 of "Respondents' Reply Brief to Brief for the United States as *Amicus Curiae*," dated May 2, 1939), clearly show that **"the apparent purpose of providing for payment of the interest on and the principal of such bonds in foreign countries was * * *" to enable "* * * residents of such countries * * * to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts. * * *"** (R. 58), **and not to protect against possible depreciation of United States money.**

Whatever, therefore, may have been the intention in Nos. 384 and 495 in respect of tying the guilder payment to the dollar, **an express contrary intention appears in the instant case**; it was always intended that the bonds and coupons should evidence actual guilder debts; it seems to follow that whatever the decision in Nos. 384 and 495, the decision in the instant case should support the right of these foreign bondholders and coupon holders to enforce payment in guilders.

13. No attempt is made at bar to enforce payment of the gold value of the dollar, or indeed the gold value of any other currency. Inasmuch as our law does not provide a method of specific performance for the payment of foreign currencies, the suit takes the form of one for damages only inasmuch as foreign money is a commodity in this country. It would appear that the majority overlooked this circumstance in arriving at its conclusions.

14. The majority opinion is predicated in part (Clerk's Advance Sheet in Nos. 384 and 495, p. 9; Clerk's Advance Sheet in the instant case, p. 1) upon the fact that no demand for payment in foreign currency was made until after the effective date of the Joint Resolution.

If the fair inference from these statements is that guilder payments might have been enforced had election for such payment been made before the effective date of the Joint Resolution, then this portion of the opinion would appear not to be in harmony with so much of the majority opinion

as rests its decision upon the ground that a contract to pay guilders (whether or not exercised) is condemned by the Joint Resolution because contained in the same instrument which contains the contract to pay dollars, and that the word "obligation" refers to the instrument rather than to the particular duty to pay gold dollars contained therein.

Even had election been made prior to June 5, 1933, the instrument would after that date nevertheless have contained within itself the unexercised promise to pay gold dollars. If an election prior to June 5, 1933, would have preserved the right to demand guilder payments thereafter, then a similar election after June 5, 1933, should have given rise, in the instant case, to a similar right.

15. At page 9 of the Clerk's Advance Sheet in Nos. 384 and 495, the majority opinion states that "on the date the Resolution went into effect no election had been made so that the railroad was, at that time, still under obligation to pay dollars." But it seems that the majority has not taken into consideration the fact that on that same day the railroad was also, at the same time, still under obligation to pay guilders. There could be independent contracts or obligations, and in fact there were. In No. 384, for instance, the independent obligation under the indenture was sued upon by the trustee; in the instant case, the separate, independent obligation upon the coupons was sued upon by the bondholders themselves. A mortgage, bonds and coupons could all be separate, independent evidences of the same debt. The obligation of the debtor was divided into at least as many separate and independent obligations to pay the same loan as there were separate instruments evidencing the loan, viz., the mortgage, the bonds and the coupons sued upon (see, *per contra*, majority opinion in Nos. 384 and 495, Clerk's Advance Sheet, p. 8). And by the same token it would appear that there could be and were at bar separate and independent contracts or obligations contained within the same instrument itself, viz., the alternative currency payments, which, in the case of the foreign moneys (in the instant case at least), were not tied to or dependent upon either (1) gold, or (2) a particular

kind of coin or currency of the United States, or (3) an amount of United States money measured by gold or a particular kind of United States coin or currency. It is respectfully submitted that the majority overlooked this circumstance in rendering its decision.

16. This Court has not specifically determined Respondents' right to receive interest, even upon the admitted face dollar amount, and may have overlooked the fact that nowhere does the amended answer allege nor does the evidence prove the readiness or willingness of Petitioner herein to pay even the dollars which it concededly owed (see pp. 94 *et seq.* of our main brief, particularly p. 96).

The typical allegation in the amended answer which comes closest to a tender (but which falls short thereof) is paragraph numbered 62 thereof (R. 40), which does not constitute a tender. And this Court has further apparently overlooked the memorandum of Mr. Justice Cohn[4] in the Appellate Division (First Department) of the New York Supreme Court specifically providing that Respondents are entitled to interest from the date the coupons were presented for payment. Respondents are entitled to interest since the right to interest is a State Court question (viz., did Petitioner make a proper tender?), and Respondents' right thereto has been conceded both by the Appellate Division and by the Court of Appeals, with the necessary conclusion therefrom that no proper tender was made. Consequently this Court should allow interest to Respondents.

17. The majority did not pass specifically upon the question of *res adjudicata* raised at pages 84 *et seq.* of our main brief, nor upon the point that a supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation, in whole or in part, of the doctrine of *res adjudicata*. *United States* v. *Moser*, 266 U. S. 236

[4] Who wrote for the majority of the Appellate Division, which took the same position as to the impact of the Joint Resolution upon the coupons here sued upon as the majority of this Court has taken.

(1924). It is respectfully submitted that the majority overlooked the fact that as to Respondents Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., judgment should be rendered for them upon the doctrine of the *Moser* case, irrespective of any decision in any other case or as to any of the other Respondents.

18. It is respectfully suggested that in basing its decision in the instant case in large part upon the opinion in Nos. 384 and 495, the majority of this Court did not take into account the essential difference in the character of the transactions, nor the essential differences between the cases as outlined in part above. It is undisputed in the present record (R. 69)—(a fact not mentioned by the majority in its opinion, and a circumstance quite different from that which obtained in Nos. 384 and 495)—that the "purchases between January and August"[5] were made "in reliance on January letter * * *"[6] and that the purchases "were all made to protect obligations in currencies other than dollars."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Court of Appeals below be, upon further consideration, affirmed, and that Respondents have such other, further and different relief as to this Honorable Court may seem just and proper in the premises.

Dated, New York, May 25, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

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[5] 1934.

[6] Petitioner's letter of January 11, 1934, quoted at R. 57 and 58, a portion of which is set forth *supra* at page 8.

Certificate of Counsel.

I, HARRY HOFFMAN, counsel for the above-named Respondents, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

HARRY HOFFMAN,
Counsel for Respondents.

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FILED
MAY 27 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

RESPONDENTS' PETITION FOR REHEARING.

HARRY HOFFMAN,
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New York, N. Y.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480. 39

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Respondents.

PETITION FOR REHEARING.

MAY IT PLEASE THIS HONORABLE COURT:

Come now the above-named Respondents, Anglo-Continentale Treuhand, A. G., a Liechtenstein corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein corporation, and Hydropress Handels, A. G., a Liechtenstein cor-

poration, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

1. This cause, together with *Guaranty Trust Company of New York* v. *Henwood et al.* (No. 384) and *Chemical Bank & Trust Company* v. *Henwood et al.* (No. 495) and *Bethlehem Steel Company* v. *Zurich General Accident & Liability Insurance Company, Limited* (No. 590), was argued during the week of February 6, 1939, and by order of this Court entered April 17, 1939, was restored to the docket and assigned for reargument on April 24, 1939, and was reargued during the week of April 24, 1939.

2. (a) This motion is made pursuant to Rule XXXIII of the Rules of the Supreme Court of the United States.

(b) Respondents intend to move this Honorable Court for an order staying the issuance of its mandate herein pending the hearing and determination of this petition for rehearing, and pending a determination upon such rehearing, if granted, and pending the further order of this Honorable Court.

3. The majority opinion herein rests its decision in substantial part upon the majority opinion in Nos. 384 and 495, October Term, 1938. *Guaranty Trust Company of New York* v. *Henwood et al.*, and *Chemical Bank & Trust Company* v. *Henwood et al.*, ... U. S. ....

4. The majority opinion in the instant case (Clerk's Advance Sheet, p. 2) states that in the absence of any claim of international rights based upon the treaty provisions of the Constitution, it is enough that Respondents' bonds are "obligations payable in the money of the United States."

The question of treaty provisions was not raised in the courts below by Petitioner, nor upon the briefs or oral arguments in this Court, and under such circumstances the question of rights based upon the treaty provisions of the Constitution was not discussed by Petitioner. Treaty rights, if any, which may be affected, are treaty rights not only with

Holland, but also treaty rights with any other country, since nationals of countries other than the place of payment (Holland) might be affected. It is respectfully submitted, however, that whether or not any rights accrue to Respondents based upon the treaty provisions of the Constitution, principles of international law and principles of comity with foreign nations should induce a revision of the decision of the majority and permit the guilder payment sought. The impact upon the domestic economy, and the effect upon coin and currency of the United States (if any), is equally as great in the case of simple guilder contracts as it is in the case of the alternative promises herein sued upon.

5. The majority opinion reaches the conclusion that the promise herein to pay guilders abroad was specifically condemned by the Joint Resolution.[1] It is respectfully submitted that, upon reconsideration, it will be found that the Joint Resolution does not condemn and that no public policy inhibits such payment. The portion of the report of the Senate Committee on the Resolution quoted in the majority opinion (p. 7 of the Clerk's Advance Sheet in Nos. 384 and 495) relates to "the withdrawal and hoarding of gold," and it is respectfully submitted that promises to pay foreign moneys (although contained in instruments which at the same time contain promises to pay United States dollars) are not mentioned in the report, and do not appear to have been considered by Congress, and therefore that this Court should, on further consideration, revise its decision and hold that the Joint Resolution does not condemn the payment here sought (see cases cited at pp. 25-26 of our main brief).

6. The majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, pp. 2 *et seq.*) states that the bonds there involved were issued and sold in the United States, that purchasers paid dollars, that interest was regularly paid in dollars, and that in that case the asserted right to guilder payment was authorized by the terms of the mortgage securing the bonds.

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[1] 48 Stat. 112; 31 U. S. C. A. 463.

At bar, however, bonds were sold in foreign countries, foreign moneys were paid (R. 78, 81), interest was paid in foreign currencies (R. 58-59) and the right to guilder payment is sued upon by the bondholders in their individual rights, irrespective of any terms of the mortgage.[2]

In the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 5) it is also stated, among other things, that the debtor was not required to keep any foreign offices; a different circumstance prevails in the case at bar, where the debtor agreed to pay "at **designated offices** in said foreign cities and countries" (form of bond, R. 28), and where Petitioner in fact actually maintained such foreign offices (see, for instance, typical allegation in moving affidavit concerning presentment for payment "in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co.," R. 45 etc.).

7. (a) In the interpretation of the contract at bar (viz, that it was a contract to pay foreign moneys abroad), involving as it does the construction of a negotiable instrument, the construction of the highest State Court is binding upon this Court. *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487 (1934); *Marine Bank* v. *Kalt-Zimmers Co.*, 293 U. S. 357 (1934); *Erie R. Co.* v *Tompkins*, 304 U. S. 64 (1938).

Under such circumstance, the construction of these bonds and coupons by the highest New York State Court (the Court

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[2] As a matter of fact, in the instant case, it appears that Petitioner "made * * * provision whereby owners of such bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, **have received** * * * payment thereof in such countries and in the currencies of such countries in the amount specified in such coupons for such countries" (R. 58).

The majority opinion does not deal with the question of the right of a person who owned bonds prior to June 5, 1933, and who still owns such bonds, and who collected his coupons in guilders in Holland prior to 1933, to continue to collect such coupons in guilders after that date; nor with the right of the successors in interest of any such person.

It is a fact, for instance, although not in the record in this case, that a list of bond numbers has been published in Amsterdam, as being bonds upon which Petitioner would continue to pay coupons in guilders for the reason that it had ascertained that on June 5, 1933 and continuously thereafter, such bonds were owned by a *bona fide* resident or residents of a country or countries other than the United States, and Petitioner itself has conceded its liability to pay the coupons upon such bonds in guilders and that it has so paid and would continue to pay the same (see letter of August 7, 1934, written in behalf of Petitioner, R. 59; see form of statement required by Petitioner in connection with such payments, R. 60-a).

of Appeals) should be binding upon this Court, and the decision arrived at should be reconsidered.

(b) The law of the State of New York, in the courts of which this action was originally brought, is to the effect that the bonds may be sued upon at maturity as independent negotiable instruments, irrespective of the terms of the mortgage, and are not limited thereby. *Enoch* v. *Brandon*, 249 N. Y. 263 (1928); *General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794, 800 (1922), aff'd 235 N. Y. 133 (1923); *Cunningham* v. *Pressed Steel Car Co.*, 238 App. Div. 624 (1933), aff'd 263 N. Y. 671 (1934).

(c) The law of the State of New York is also that the coupons here sued upon are independent negotiable instruments and may be sued upon at maturity, irrespective of the provisions of the bonds or of the mortgage, and not limited thereby. *Evertson* v. *National Bank of Newport*, 66 N. Y. 14 (1876), cited with approval in *Chase National Bank* v. *Faurot*, 149 N. Y. 532, 536 (1896).

(d) The language in the bonds here in suit referring to the trust mortgage (R. 28) does not, under New York law, limit the right of the holder of the bonds or coupons, at the maturity date, to sue for the recovery of the money amount. See cases cited under Points 7 (b) and 7 (c), *supra*.

(e) No attempt has been made at bar to enforce any of the provisions of the mortgage itself.

(f) The reasoning of the decision in Nos. 384 and 495, therefore, does not apply to the instant case.

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9. The decision of the majority, holding in effect that the obligation may be discharged by payment in lawful money, does not treat with the question of the right of the holder of the bonds and coupons to present and demand payment thereof, according to their tenor, in foreign countries (at bar, Amsterdam, Holland), in the respective foreign countries, nor with the obligation of Petitioner in respect of such a demand. The decision of the majority does not indicate whether a holder of these multiple currency instruments, payable in various countries in various currencies, must now present such instruments in America only, or may still present the same abroad, although the decision does hold that the obligation may be discharged in lawful American dollars.

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Further, in the cited case the decision rests partly upon the conclusion that the intention of the parties was *merely to promote the convenience* of bondholders in making the bonds payable in two separate cities, whereas at bar the express intention was to make payments in foreign monetary units abroad. See Point 12, *infra*.

12. At page 10 of the opinion in Nos. 384 and 495, the majority of this Court make the following statement:

> "Here, the admitted purpose of the multiple currency provision supplementing the gold clause was the same as that of the gold clause itself, that is, to afford creditors of United States debtors on domestic money obligations contractual protection against possible depreciation of United States money."

Whether or not such purpose was admitted in Nos. 384 and 495, no such purpose was admitted in the instant case, and the contrary is the fact. The offering in England and in Holland, considered in the further light of the Dutch offering circular in the Dutch language, supplemented by the listing of these bonds upon the London and Amsterdam Stock Exchanges and the trading thereof in Amsterdam (R. 56), further supplemented by

the statement of Petitioner itself (quoted also at p. 20 of "Respondents' Reply Brief to Brief for the United States as *Amicus Curiae*," dated May 2, 1939), clearly show that **"the apparent purpose of providing for payment of the interest on and the principal of such bonds in foreign countries was * * *" to enable "* * * residents of such countries * * * to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts. * * *" (R. 58), and not to protect against possible depreciation of United States money.**

Whatever, therefore, may have been the intention in Nos. 384 and 495 in respect of tying the guilder payment to the dollar, **an express contrary intention appears in the instant case**; it was always intended that the bonds and coupons should evidence actual guilder debts; it seems to follow that whatever the decision in Nos. 384 and 495, the decision in the instant case should support the right of these foreign bondholders and coupon holders to enforce payment in guilders.

13. No attempt is made at bar to enforce payment of the gold value of the dollar, or indeed the gold value of any other currency. Inasmuch as our law does not provide a method of specific performance for the payment of foreign currencies, the suit takes the form of one for damages only inasmuch as foreign money is a commodity in this country. It would appear that the majority overlooked this circumstance in arriving at its conclusions.

14. The majority opinion is predicated in part (Clerk's Advance Sheet in Nos. 384 and 495, p. 9; Clerk's Advance Sheet in the instant case, p. 1) upon the fact that no demand for payment in foreign currency was made until after the effective date of the Joint Resolution.

If the fair inference from these statements is that guilder payments might have been enforced had election for such payment been made before the effective date of the Joint Resolution, then this portion of the opinion would appear not to be in harmony with so much of the majority opinion

as rests its decision upon the ground that a contract to pay guilders (whether or not exercised) is condemned by the Joint Resolution because contained in the same instrument which contains the contract to pay dollars, and that the word "obligation" refers to the instrument rather than to the particular duty to pay gold dollars contained therein.

Even had election been made prior to June 5, 1933, the instrument would after that date nevertheless have contained within itself the unexercised promise to pay gold dollars. If an election prior to June 5, 1933, would have preserved the right to demand guilder payments thereafter, then a similar election after June 5, 1933, should have given rise, in the instant case, to a similar right.

15. At page 9 of the Clerk's Advance Sheet in Nos. 384 and 495, the majority opinion states that "on the date the Resolution went into effect no election had been made so that the railroad was, at that time, still under obligation to pay dollars." But it seems that the majority has not taken into consideration the fact that on that same day the railroad was also, at the same time, still under obligation to pay guilders. There could be independent contracts or obligations, and in fact there were. In No. 384, for instance, the independent obligation under the indenture was sued upon by the trustee; in the instant case, the separate, independent obligation upon the coupons was sued upon by the bondholders themselves. A mortgage, bonds and coupons could all be separate, independent evidences of the same debt. The obligation of the debtor was divided into at least as many separate and independent obligations to pay the same loan as there were separate instruments evidencing the loan, viz., the mortgage, the bonds and the coupons sued upon (see, *per contra*, majority opinion in Nos. 384 and 495, Clerk's Advance Sheet, p. 8). And by the same token it would appear that there could be and were at bar separate and independent contracts or obligations contained within the same instrument itself, viz., the alternative currency payments, which, in the case of the foreign moneys (in the instant case at least), were not tied to or dependent upon either (1) gold, or (2) a particular

kind of coin or currency of the United States, or (3) an amount of United States money measured by gold or a particular kind of United States coin or currency. It is respectfully submitted that the majority overlooked this circumstance in rendering its decision.

16. This Court has not specifically determined Respondents' right to receive interest, even upon the admitted face dollar amount, and may have overlooked the fact that nowhere does the amended answer allege nor does the evidence prove the readiness or willingness of Petitioner herein to pay even the dollars which it concededly owed (see pp. 94 *et seq.* of our main brief, particularly p. 96).

The typical allegation in the amended answer which comes closest to a tender (but which falls short thereof) is paragraph numbered 62 thereof (R. 40), which does not constitute a tender. And this Court has further apparently overlooked the memorandum of Mr. Justice Cohn[4] in the Appellate Division (First Department) of the New York Supreme Court specifically providing that Respondents are entitled to interest from the date the coupons were presented for payment. Respondents are entitled to interest, since the right to interest is a State Court question (viz., did Petitioner make a proper tender?), and Respondents' right thereto has been conceded both by the Appellate Division and by the Court of Appeals, with the necessary conclusion therefrom that no proper tender was made. Consequently this Court should allow interest to Respondents.

17. The majority did not pass specifically upon the question of *res adjudicata* raised at pages 84 *et seq.* of our main brief, nor upon the point that a supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation, in whole or in part, of the doctrine of *res adjudicata*. *United States* v. *Moser*, 266 U. S. 236

[4] Who wrote for the majority of the Appellate Division, which took the same position as to the impact of the Joint Resolution upon the coupons here sued upon as the majority of this Court has taken.

(1924). It is respectfully submitted that the majority overlooked the fact that as to Respondents Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., judgment should be rendered for them upon the doctrine of the *Moser* case, irrespective of any decision in any other case or as to any of the other Respondents.

18. It is respectfully suggested that in basing its decision in the instant case in large part upon the opinion in Nos. 384 and 495, the majority of this Court did not take into account the essential difference in the character of the transactions, nor the essential differences between the cases as outlined in part above. It is undisputed in the present record (R. 69)—(a fact not mentioned by the majority in its opinion, and a circumstance quite different from that which obtained in Nos. 384 and 495)—that the "purchases between January and August" [5] were made "in reliance on January letter * * *" [6] and that the purchases "were all made to protect obligations in currencies other than dollars."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Court of Appeals below be, upon further consideration, affirmed, and that Respondents have such other, further and different relief as to this Honorable Court may seem just and proper in the premises.

Dated, New York, May 25, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

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[5] 1934.

[6] Petitioner's letter of January 11, 1934, quoted at R. 57 and 58, a portion of which is set forth *supra* at page 8.

Certificate of Counsel.

I, HARRY HOFFMAN, counsel for the above-named Respondents, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

HARRY HOFFMAN,
Counsel for Respondents

SUPREME COURT OF THE UNITED STATES.

Nos. 590 and 591.—October Term, 1938.

Bethlehem Steel Company, Petitioner, 590 *vs.* Zurich General Accident & Liability Insurance Company, Limited.	On Writs of Certiorari to the Supreme Court of the State of New York.
Bethlehem Steel Company, Petitioner, 591 *vs.* Anglo-Continentale Treuhand, A. G., et al.	

[May 22, 1939.]

Mr. Justice Black delivered the opinion of the Court.

As did Nos. 384 and 495 this day decided, *supra*, p. —, these cases involve efforts to enforce foreign currency provisions of bond obligations payable in money of the United States and optional fixed amounts of foreign currencies. The obligations are essentially similar to those in Nos. 384 and 495, but differ in two respects: (1) the bonds, originally sold in this country to a group of bankers,[1] were offered by that group not only in this country but also abroad, and (2) the present holders are foreign corporations, some of whose bonds were bought in foreign countries. These distinctions do not remove foreign holders from the operation of the Joint Resolution of June 5, 1933.

Respondents did not purchase their bonds or elect to demand payment in foreign currency until after the effective date of the Resolution. The court below held the Resolution was not applicable.[2]

It is respondents' contention that their bonds represent a form of private international obligation, in no wise subject to the laws of the United States. However, they seek to enforce that obligation in this country and Congress has, as it constitutionally may, provided that multiple currency provisions of dollar obligations

[1] Some bonds were originally issued to stockholders in No. 590.

[2] 279 N. Y. 495, 790.

are against public policy here and, thus, unenforceable. The Constitution provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Courts in this country, State and Federal, can no longer enforce the contractual provisions which respondents have proceeded on, irrespective of their place of making.

In the absence of any claim of international rights based upon the treaty provision of the Constitution, it is enough that respondents' bonds are "obligations payable in the money of the United States", as we have this day held.

Under the governing principles announced in Nos. 384 and 495, the multiple currency provisions of respondents' bonds are within the operation of the Resolution, and their coupons are dischargeable dollar for dollar in current legal tender money of the United States.

Reversed.

The CHIEF JUSTICE, Mr. Justice MCREYNOLDS, Mr. Justice BUTLER and Mr. Justice STONE think the judgments in these cases should be affirmed, for reasons stated in the opinion of Mr. Justice STONE in No. 384, *Guaranty Trust Company of New York* v. *Henwood*, and No. 495, *Chemical Bank & Trust Company* v. *Henwood*.

A true copy.

Test:

Clerk, Supreme Court, U. S.